TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 514.

HOLMAN A. DREW, SHERIFF OF COOS COUNTY, STATE OF NEW HAMPSHIRE, APPELLANT,

vs.

HARRY KENDALL THAW.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW HAMPSHIRE.

FILED JUNE 5, 1914.

(24,256)

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DISTRICT COURT OF THE UNITED STATES.
DISTRICT OF NEW HAMPSHIRE.

No. 86, Law.

IN RE PETITION OF HARRY KENDALL THAW FOR WRIT OF HABEAS CORPUS.

PETITION FOR WRIT OF HABEAS CORPUS.

[Filed September 13, 1913.]

To

THE HONORABLE EDGAR ALDRICH,
United States District Judge, of the United States,
For the District of New Hampshire.

The petition of Harry Kendall Thaw respectfully shows to this Court:

FIRST: That said Harry Kendall Thaw is unlawfully imprisoned and deprived of his liberty without his consent and volition, by Holman A. Drew, Sheriff of the County of Coös, State of New Hampshire, and some agent or subordinate of the said Sheriff, or other person whom he designates by the fictitious name of John Doe, said captor's real name being unknown to the petitioner.

SECOND: That petitioner is unlawfully detained within the District of New Hampshire under color of the authority of the United States, in violation of the provisions of the United States Constitution, Article 4, Section 2, Subdivision 2, and Section 5278 of the Revised Statutes of the United States concerning the rendition of alleged fugitives from justice from any state in the United States, and contrary to the provisions of the Fourteenth Amendment of the Constitution of the United

States forbidding any state to deprive any person of liberty without due process of law; that a copy of the warrant under which petitioner is detained is hereto annexed and made part hereof, being marked Exhibit A, and petitioner verily believes that said warrant is the cause or pretence of his imprisonment or restraint; that the petitioner was arrested and taken into custody under and pursuant to said warrant on the tenth day of September 1913, within the County of Coös and within the District of New Hampshire.

THIRD: That petitioner avers that said warrant under which petitioner is detained and imprisoned is illegal, null and void, and was issued without jurisdiction; and he particularly refers to each and all of the following grounds upon which said averment is based, and avers the truth of the facts herein stated concerning said warrant:

1. That in the said warrant it is stated and alleged "that one Harry K. Thaw, Richard J. Butler, a man about six feet tall, fairly light complexion, smooth shaven and weighing about 185 or 190 pounds, and having a large nose; and Roger Thompson, a man about six feet tall and weighing about 160 or 165 pounds and clean shaven and square shoulders and well built and wearing a blue suit, fair complexion; Michael O'Keefe, Eugene Duffy and Howard Barnum and Thomas Flood, at the City of Beacon, County of Dutchess and State of New York, on the seventeenth day of August, 1913, did wilfully, knowingly, corruptly and falsely commit the crime of conspiracy against the People of the State of New York by conspiring among themselves to commit acts for the prevention and obstruction of justice, and the due administration of the laws, and to commit a crime by conspiring and arranging and planning to effect and procure the escape of one Harry K. Thaw, a prisoner duly committed to and confined in the Matteawan State Hospital, a criminal insane hospital of the State of New York, and by arranging, procuring, planning, and carrying out the escape of the said Harry K. Thaw, whereby on the 17th day of August, 1913, said Harry K. Thaw, with the aid and assistance of the said above named parties and defendants, did escape from the said Matteawan State Hospital for the Criminal Insane at the

City of Beacon, in the County of Dutchess and State of New York, contrary to the form of the Criminal Code of said State of New York, and against the peace and dignity of said State of New York.

"That the said Harry K. Thaw has fled from justice in said State of New York, and has made his escape to, and is now found within this State, and is liable, by the constitution and laws of the United States, to be delivered over upon the demand of the executive of said State of New York, from which the said Harry K. Thaw has fled, to be removed to the State having jurisdiction of said crime;

"Wherefore the said Holman A. Drew prays that a warrant may issue to bring the said Harry K. Thaw before the Police Court for the District of Colebrook, that the said Harry K. Thaw may be held to answer to this complaint, and that justice may be done in the premises."

2. That the said warrant fails to charge the petitioner, Harry K. Thaw, with having committed any crime, and that the Magistrate signing the said warrant is without jurisdiction to hold the petitioner upon the same, in that the said warrant fails to charge petitioner with any crime.

3. Because the said warrant affirmatively and on its face shows that the said Harry K. Thaw, this petitioner, was duly committed and duly confined in the Matteawan State Hospital for the Criminal Insane, and is therefore unable to be guilty of any crime under the Constitution and laws of the State of New York.

4. Because your petitioner has been adjudged insane in proceedings had under and pursuant to the laws of the State of New York, and is therefore unable to and has not the capacity to commit a crime under the Constitution of the United States and laws of the United States or of the State of New York or of the State of New Hampshire.

5. Because under and pursuant to the laws of the State of New York, it is not criminal for an inmate of a State Hospital for the Insane to escape therefrom, there being no provision in the laws of the State of New York making it either a felony, misdemeanor, or other offence for one confined in a State Hospital to escape therefrom.

6. Because your petitioner is not a fugitive from justice from the State of New York, not having committed any crime therein, nor having the capacity to commit any crime therein, and is therefore not a fugitive in the State or District of New Hampshire.

FOURTH: That your petitioner is informed and believes that there are at present in the State and District of New Hampshire certain officers from the Matteawan Hospital for the Criminal Insane in the State of New York, and other officers of the State of New York, who intend unlawfully and forcibly to seize this petitioner and unlawfully and forcibly, under color and pretence of the said warrant and of the proceedings taken and had thereunder, to obtain possession of the body of this petitioner, and unlawfully and forcibly, in violation of his legal rights, and without due process of law and in contravention of Article 4, Section 2, of the Constitution of the United States, and of the Fourteenth Amendment to the Constitution of the United States, to convey this petitioner, against his will, from the State and District of New Hampshire to the State of New York.

FIFTH: Your petitioner further avers that he has not at any time been confined in the said Matteawan State Hospital for the Criminal Insane as the result of or upon the finding of any verdict of conviction of any offence, whether felony, misdemeanor, or other offence against the State of New York or elsewhere, but has merely been confined therein as an insane person or as an alleged insane person; and your petitioner reserves the right to amend this petition and to supplement the same by any further facts which he may be advised by his counsel may be proper and material to the application herein made.

SIXTH: That your petitioner has been advised by counsel from the Bar of both said States of New York and New Hampshire that the alleged offence which he is claimed to have committed in the said State of New York, and for which said warrant is issued, is not an offence against the laws of the State of New York, and the facts upon which the said alleged crime is based do not constitute a proper charge of such felony, misdemeanor, or any other offence against the said State of New York.

SEVENTH: That the said warrant is not taken out in good faith, nor will this petitioner if returned to the State of New York be put upon trial upon any indictment charging him with the offence of conspiring, but that the said warrant and complaint are merely a pretext to return the petitioner to the State of New York and to confine him there, within the said Matteawan State Hospital for the Criminal Insane.

WHEREFORE your petitioner prays that a writ of habeas corpus, directed to the said Holman A. Drew, Sheriff of the County of Coös, in the State of New Hampshire, and to the said John Doe, wherever they may be found within the District of New Hampshire, having the petitioner in custody, and that your petitioner, pending such hearing, may be held to bail; and your petitioner will ever pray.

Dated September 11th, 1913.

HARRY KENDALL THAW,
Petitioner.

MARTIN & HOWE
DREW, SHURTLEFF, MORRIS & OAKES
GOSS & JAMES
T. F. JOHNSON
HOUSE, GROSSMAN & VORHAUS
Attorneys for Petitioner.

UNITED STATES OF AMERICA
DISTRICT OF NEW HAMPSHIRE.

Coos ss.

HARRY KENDALL THAW on oath deposes and says that he is the petitioner named in the foregoing petition; that he has read the same and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated to be alleged on information and belief, and as to those matters, he believes them to be true.

Sworn to before me this 11th day of September, 1913.

MERRILL SHURTLEFF,
Justice of the Peace.

RESCRIPT.

(September 13, 1913.)

ALDRICH, J.

The petition of Harry K. Thaw for a writ of habeas corpus, under United States authority, invokes the 14th Amendment to the Constitution of the United States, which, among other things, declares that no state shall deprive any person of life, liberty or property without due process of law, as well as other Federal laws with reference to the restraint of personal liberty. It is not necessary for present purposes to consider the allegations of the petition, other than that based upon the 14th Amendment, because under Federal Statutes, the writ upon such an allegation as that contained in the petition issues quite as a matter of course, if not as a matter of right. It is ordered that the writ issue and be made returnable before me at Littleton, New Hampshire, September 16, 1913, at 11 a. m., at which time, unless this order be extended, the respondent will make proper answer.

While reserving to Federal authority the exercise of all such ultimate power, and the discharge of all such duty, as the Constitution and Laws of the United States contemplate, in a situation like this, and while according to Federal and State interpretations, State authority in respect to extradition results primarily, if not altogether, from Federal law, it is not intended that the issuance of the writ shall interfere at all for the present, at least, with such of the State authorities of the State of New Hampshire as may be called upon to deal with problems involved in the proposition of extradition.

All persons should be strictly enjoined from interference with the execution of the writ.

The United States Marshal, proceeding under the writ of habeas corpus should confer and coöperate with Hotman A. Drew, or any other person claiming to hold said Harry K. Thaw in custody and in connection with him or them, employ and use such force as is necessary to hold the custody of Thaw safe and such as may be necessary to protect him from violence or indignity, if such shall be attempted.

Let an order be attached to the writ which shall cover these suggestions.

WRIT OF HABEAS CORPUS AND ORDER OF COURT.

[Issued September 13, 1913.]

UNITED STATES OF AMERICA.

To

HOLMAN A. DREW, *Sheriff of Coös County, State of New Hampshire, and* "JOHN DOE," *the name* "JOHN DOE" *being fictitious and being used to designate an agent, deputy, aid or assistant of the said Holman A. Drew, Sheriff of Coös County aforesaid, or other person, having in custody one Harry Kendall Thaw, the real name of said persons being unknown to the petitioner,*

GREETING:

WE COMMAND YOU that you have the body of Harry Kendall Thaw by you imprisoned and detained, together with the time and cause of such imprisonment and detention, by whatever name said Harry Kendall Thaw shall be called or charged, before the Honorable Edgar Aldrich, United States District Judge for the District of New Hampshire, on the sixteenth day of September, A. D., 1913, at 11 o'clock in the forenoon of that day, in the United States Court House at the Town of Littleton, in the District of New Hampshire aforesaid, to do and receive what shall then and there be considered concerning said Harry Kendall Thaw, and have you then and there this writ.

WITNESS HONORABLE EDGAR ALDRICH, United States District Judge for the District of New Hampshire, at Concord, in said District, this 13th day of September, 1913.

[SEAL.]

BURNS P. HODGMAN,
Clerk U. S. District Court.

To E. P. NUTE, U. S. Marshal:

In executing the precept to which this order is annexed, you will proceed to Colebrook, N. H., or such other place as you may find Holman A. Drew or such other person or persons covered by the writ as may have the said Harry K. Thaw in custody, and when found, coöperate with him or them, and in connection

with him or them employ or use such force as is necessary to hold the custody of Thaw safe, and such as may become necessary to protect said Thaw from violence and indignity, if such shall be attempted. All persons are enjoined from interfering with the proper execution of the process to which this is annexed, and you will see that this injunction is executed.

By order of EDGAR ALDRICH, Judge of the District Court of the United States for the District of New Hampshire.

BURNS P. HODGMAN,
Clerk U. S. District Court.

[MARSHAL'S RETURNS.]

UNITED STATES OF AMERICA.
DISTRICT OF NEW HAMPSHIRE, ss.

CONCORD, N. H., September 13, 1913.

I certify that I have this day served on James P. Tuttle, Attorney General of the State of New Hampshire, a copy of the within writ of habeas corpus and order of court thereto attached, both attested by Burns P. Hodgman, Clerk of U. S. District Court.

F. S. JOHNSON,
Deputy U. S. Marshal.

Fees	
Service	$2.00
Travel	.06
	$2.06

UNITED STATES OF AMERICA.
DISTRICT OF NEW HAMPSHIRE ss.

COLEBROOK, N. H., September 15, 1913.

Pursuant herewith, I have this day served the within writ of habeas corpus upon Holman A. Drew, Sheriff of Coös County, who had the custody of the within named Harry K. Thaw, and upon William T. Jerome, of counsel for the state of New York, by giving to each of them, in hand, a copy of said writ and order

of court thereon, both attested by Burns P. Hodgman, Clerk of U. S. District Court.

E. P. NUTE,
United States Marshal.

Fees	
Service (2)	$4.00
Travel	10.20
	$14.20

[RETURNS OF SHERIFF ON WRIT OF HABEAS CORPUS.]

UNITED STATES DISTRICT COURT, DISTRICT OF NEW HAMPSHIRE.

IN THE MATTER OF HARRY KENDALL THAW.

To the HONORABLE EDGAR ALDRICH, *United States District Judge of the United States for the District of New Hampshire:*

I, Holman A. Drew, hereby respectfully make return to the writ of habeas corpus heretofore issued in the above entitled matter and served on me, as follows:

FIRST. I am the sheriff of Coös County in the State of New Hampshire.

SECOND. I have in my custody the body of one Harry Kendall Thaw, and pursuant to said writ of habeas corpus I now here produce the body of said Harry Kendall Thaw.

THIRD. The cause of my detention and imprisonment of said Harry Kendall Thaw is as follows:

The said Harry Kendall Thaw was imprisoned by me upon the 10th day of September, 1913, and has been since that time imprisoned and detained by me by virtue of certain process directed to me by a justice of the peace for the County of Coös in the State of New Hampshire. A true copy of said process is hereunto annexed, is marked Exhibit A and is intended to be taken as a part of this my return to the said writ of habeas corpus.

FOURTH. And in further compliance with the command of said writ of habeas corpus I have now here the copy of said writ heretofore served upon me.

Dated
September 16th, 1913
at Littleton, New Hampshire

HOLMAN A. DREW,
Sheriff of Coös County,
State of New Hampshire.

EXHIBIT A.

To BERNARD JACOBS, *a Justice of the Peace for the County of Coös.*

Holman A. Drew, of Berlin in said County, complains

"that one Harry K. Thaw, Richard J. Butler, a man about six feet tall, fairly light complexion, smooth shaven and weighing about 185 or 190 pounds, and having a large nose; and Roger Thompson, a man about six feet tall and weighing about 160 or 165 pounds and clean shaven and square shoulders and well built and wearing a blue suit, fair complexion; Michael O'Keefe, Eugene Duffy and Howard Barnum and Thomas Flood, at the City of Beacon, County of Dutchess and State of New York, on the seventeenth day of August, 1913, did wilfully, knowingly, corruptly and falsely commit the crime of conspiracy against the People of the State of New York by conspiring among themselves to commit acts for the prevention and obstruction of justice, and the due administration of the laws, and to commit a crime by conspiring and arranging and planning to effect and procure the escape of one Harry K. Thaw, a prisoner duly committed to and confined in the Matteawan State Hospital, a criminal insane hospital of the State of New York, and by arranging, procuring, planning, and carrying out the escape of the said Harry K. Thaw, whereby on the 17th day of August, 1913, said Harry K. Thaw, with the aid and assistance of the said above named parties and defendants, did escape from the said Matteawan State Hospital for the Criminal Insane at the City of Beacon, in the County of Dutchess and State of New York, contrary to the form of the Criminal Code of said State of New York, and against the peace and dignity of said State of New York.

"That the said Harry K. Thaw has fled from justice in said State of New York, and has made his escape to, and is now found within this State, and is liable, by the constitution and laws of the United States, to be delivered over upon the demand of the executive of said State of New York, from which the said Harry K. Thaw has fled, to be removed to the State having jurisdiction of said crime;

"Wherefore the said Holman A. Drew prays that a warrant

may issue to bring the said Harry K. Thaw before the Police Court for the District of Colebrook, that the said Harry K. Thaw may be held to answer to this complaint, and that justice may be done in the premises."

(Signed) HOLMAN A. DREW.

Coös, ss. September 10, 1913.

Personally appeared Holman A. Drew, and made oath that the above complaint by him subscribed is, in his belief, true.

Before me,

BERNARD JACOBS, *Justice of the Peace.*

(L. S.) STATE OF NEW HAMPSHIRE. Coös, ss.

To the Sheriff of said County of Coös, or his deputy, or to any Constable or Police Officer of any Town in said County:

WHEREAS Holman A. Drew of Berlin in the County of Coös has exhibited to me, Bernard Jacobs, Justice of the Peace for the County of Coös his aforesaid and annexed complaint, upon oath, against Harry K. Thaw of Beacon in the County of Dutchess and State of New York,

WE COMMAND YOU, therefore, to take the said Harry K. Thaw (if to be found in your precinct) and bring him before the Police Court for the District of Colebrook at the Colebrook Police Court Room, in Colebrook, in said County,

AND WE FURTHER COMMAND YOU, to summon to appear, and testify what he may know relating to said complaint, when and where you may have said before said Police Court for trial.

Dated the 10th day of September, 1913.

(Signed) BERNARD JACOBS,
Justice of the Peace.

Coös, ss. Sept. 10, 1913.

I have arrested the body of the above named Harry K. Thaw and now have him before the said Police Court as commanded, and I have summoned, as above commanded, the said

. . . . . .

(Signed) HOLMAN A. DREW,
Sheriff.

(*On the back of the writ of habeas corpus is the following:*)
Writ of habeas corpus and returns thereon. Returned in the United States District Court sitting at Littleton within and for the District of New Hampshire, on Sept. 16, 1913; and the body of Harry K. Thaw was produced in open court by Holman A. Drew, Sheriff of Coös County, against whom, with others, the writ was directed.

Attest: BURNS P. HODGMAN,
Clerk.

RECORD OF PROCEEDINGS AT LITTLETON, SEPTEMBER 16, 1913.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE.

September 16, 1913, 11 A. M.

IN RE HARRY KENDALL THAW.

Before THE HONORABLE EDGAR ALDRICH, sitting as District Judge in the United States Court.

CLERK: In the matter of the petition of Harry Kendall Thaw for writ of habeas corpus. This writ is directed to Holman A. Drew. Is Mr. Drew in court?

MR. DREW: Yes, sir.

CLERK: Mr Drew, have you the body of Harry K. Thaw in court?

MR. DREW: I have.

COURT: The petitioner being in court, the responsibility in respect to custody is shifted, and for the time being and temporarily I appoint Mr. E. P. Nute, United States Marshal, and Holman A. Drew keepers, who for the present will be charged with the responsibility of custody. Who appears for the petitioner?

MR. SHURTLEFF: If the Court please, Drew, Shurtleff, Morris & Oakes appear for the petitioner, and Nathaniel E. Martin of Concord, House, Grossman & Vorhaus of New York City

as I understand it, and former Governor William A. Stone of Pennsylvania.

COURT: Who appears to resist the writ? Who appears for the State of New York?

MR. JEROME: In behalf of the State of New York, Mr. Franklin Kennedy, William Travers Jerome, as deputy Attorney General, and Mr. Bernard Jacobs of the New Hampshire Bar.

COURT: Well, what is to be said?

MR. SHURTLEFF: If the Court please, I suppose we are here at this time to fix a time for the hearing on the petition. And we are informed, although not officially, that requisition papers have been filed with the Governor of our State, and that he has consented to grant us a hearing on the requisition papers. We are also informed, although not officially, that that hearing will be held tomorrow at ten o'clock. At any rate, it will probably be held in the immediate future. We ask at this time that this hearing be postponed until some time after the Governor may have heard the case on the requisition papers and has rendered his decision.

MR. JEROME: In regard to that, if it pleases Your Honor, we desire to interpose an objection. We believe that an examination of the return to this writ of habeas corpus will show that the questions raised are entirely frivolous in character, and interposed only for the purpose of delay. There is no federal question involved here, as shown by the petition and the return, federal in the sense that the laws of the State of New York or the State of New Hampshire are challenged. The memorandum which Your Honor filed in granting the writ pointed out that the writ issued practically as of course, in view of the formal allegation that the detention was in violation of the 14th Amendment of the Constitution of the United States, in that the prisoner was detained without due process of law. A wide familiarity with extradition cases enables me to say with some degree of assurance that the papers in this case are exactly the same as papers ordinarily employed in interstate rendition, are precisely such as have been time and time again passed upon both by the state and federal courts, and without exception, as far as I am aware, the extradition has

always been granted. I wish in no way to challenge the good faith of counsel, but I feel constrained to say that in my judgment this writ has been sought not so much to enable the relator and his attorneys to present to this court a serious question deserving this court's attention but they have pursued a course which it seems to me, if the facts of which I am appraised are so, that approaches very close to trifling with the process of this Honorable Court. I hold in my hand an affidavit sworn to by one Lindsey Dennison, which sets forth in substance that he was informed by Mr. Grossman, one of the counsel for the defendants, the substance of it is that the purpose of obtaining this writ was because they had found that under the laws of the State of New Hampshire there would be danger, if the Governor honored the requisition from the State of New York, that this prisoner would be removed to the State of New York before they could obtain from the courts of New Hampshire a writ of habeas corpus; and that therefore they had resorted to this process in the federal court as a safeguard,—safeguard being the word used by counsel,—not to present to this court apparently any question, but that they might use the process of this court should the Governor grant requisition to delay the removal of the prisoner until they would have time to apply to the courts of New Hampshire. I think, sir, we have been now in trying to secure the return of the body of this prisoner to the State of New York something over three weeks. If there was really presented here a serious question, one that would be even of professional interest to discuss and examine, I would be the last person to oppose any reasonable delay that counsel might be adequately prepared to submit it to Your Honor, and that Your Honor might give it the consideration that it is entitled to. But an examination of this return by Your Honor I think will convince you that every one of the features required by the Revised Statutes of the United States, and by the Constitution of the United States has been complied with. It is so plain on the face of the papers that there is not even a scintilla of violation of any right here, but it is the ordinary due course of procedure, that I beg that Your Honor will not remand us to some future day and impose upon us the fur-

ther delays that have already occurred in this case. The requisition of the Governor of the state of New York has been presented to the Governor of the state of New Hampshire. He had made an appointment for tomorrow to hear it, but I am informed by Mr. Jacobs that he has postponed the hearing on that requisition until Friday. I say here to Your Honor that should the Governor decide adversely to this prisoner, as I practically told counsel, there will be no unseemly haste in endeavoring to remove this prisoner from the jurisdiction of the courts of New Hampshire. It is more important, sir, to the interests of the state of New York which I have the honor to represent, that we should proceed with dignity and decorum in a case already filled with scandal than that we should have the body of Harry Kendall Thaw or any other fugitive from its justice. Should the Governor of the state of New Hampshire decide to return this man under the requisition there will be ample opportunity afforded by the representatives of the state of New York, and I have no doubt if we were unwilling to do it the Governor would be willing to see to it that ample time would be afforded, for such review of his action in the courts of New Hampshire as might be fit and appropriate. While it is a distasteful task to suggest that this writ is not for the purpose of submitting to Your Honor serious questions, I feel constrained, in view of the affidavit that I have here and which I will file, and if it is traversed there are at least four witnesses in court who can testify to the same state of facts, I feel constrained to say, sir, that this writ is applied for rather for the purpose of delay, that this may get into the courts of New Hampshire on a writ of habeas corpus, than for the purpose of presenting to Your Honor a serious question either of law or fact.

COURT: Well, precisely what is your motion here? The return of the sheriff is attached to this writ?

MR. JEROME: The sheriff has made his return, I believe, sir.

COURT: And in that he states the process under which Thaw is held?

MR. JEROME: He does, sir. If Your Honor will allow me to state the process which he says, the return shows that he made complaint before a justice of the peace of the state of

New Hampshire in the county of Coös that Harry Kendall Thaw was a fugitive from justice to the state of New York, setting forth that he was in the state of New York charged with the crime of conspiracy, and asked that he be held to await extradition. Upon that the mandate of the justice issued to the sheriff, and the sheriff is holding him under that mandate. Since the issuance of that, the requisition papers from the Governor of the state of New York upon the Governor of the state of New Hampshire have arrived and have been filed with the secretary of state of New Hampshire, and are now before the Governor.

COURT: Has the sheriff made the commitment process under which Thaw was held in the New York institution a part of his answer?

MR. JEROME: No, sir.

COURT: That may become material. How do you understand that he was held there?

MR. JEROME: How he was held in New York?

COURT: Yes.

MR. JEROME: I have here an exemplified copy of the warrant under which he was held there.

COURT: Was he held as a criminal or as an insane person?

MR. JEROME: In the first instance, under our law when a jury acquits a man of a charge of murder where the defence is insanity, they are required by our law to specify in their verdict the ground of their acquittal. It was specified in the verdict acquitting him of the charge of murder in the first degree that he was acquitted on the ground of insanity. A Supreme Court Judge of the state of New York before whom the trial was held then, in accordance with the provisions of our law, committed him to the state asylum for the insane at Matteawan in pursuance of our provisions of law until discharged therefrom by due process of law. Thereafter, on three occasions he sued out writs of habeas corpus, contending that he had become sane and was entitled to his discharge. The first writ was returnable before a Judge of the Supreme Court and the hearing, if my memory is correct, occupied I think four days. That was in 1908, almost immediately after his acquittal and com-

mitment to this institution. In 1909 he sued another writ and it occupied about five weeks. In July, 1912—

COURT: I don't think the history of the case is material, except—

MR. JEROME: Well, it is under orders of those Judges that he is held, sir.

COURT: One moment. I do not think the history of the case is material except so far as it bears upon the question of process, if at all,—upon the question whether the process under which he is now held here in New Hampshire is due process within the meaning of the federal constitution. Now it may be, we shall find out about that later on, that the process under which he was held at Matteawan will become material upon the question whether he is restrained in New Hampshire upon process in accordance with the spirit of the constitution in respect to due process. I don't say that you should act upon this suggestion, if at all, now, but later on it may become material to inquire whether the conditions under which he is held in New Hampshire do not require that the authority under which he was held in New York should become a part of the proceeding here in the sense of the pending inquiry as to whether he is now constitutionally held and restrained by the state of New Hampshire. The time was fixed in the writ for the return, and was shorter than was intended. I acted upon the supposition that this writ was to be served Saturday. I supposed that that was to be done. It seems it was not served until yesterday, so you are entitled to further time. The sheriff is entitled to further time to perfect his return if he wishes it. Now you understand that under the 14th Amendment as construed, that a writ of this character issues as of course and as of right unless it appears from the papers that the restraint is clearly in accordance with law. Well now, that being so, there was no intimation to me that it was for the purpose of holding it over anybody or over any state authority but for the purpose of safeguarding the petitioner's rights in a proper way. Of course, if you seriously contend here that it was a fictitious proceeding, or that it was obtained for improper purposes, I should hear you on that question.

MR. JEROME: With Your Honor's permission—

COURT: I perhaps ought to say further that I informed Mr. Shurtleff that while I understood the decisions of the Supreme Court made it imperative upon me under the circumstances to issue a writ, that the writ once issued would present a situation in which the broadest discretion should be exercised with the view of not interfering with the ordinary course of extradition proceedings, and now they come here and say they are not pressing for an immediate hearing. Do you want one?

MR. JEROME: Yes.

COURT: On what question?

MR. JEROME: We say that our return shows that he is lawfully held under the laws and Constitution of the United States in extradition proceedings, and we ask Your Honor to quash the writ and remand the prisoner to the custody from whence he came.

COURT: What does the other side say to that?

MR. MORRIS: Your Honor, the question here is a question of whether or not there should be an immediate hearing or whether this matter should be continued to await the action of the Governor and Council. We have been charged with bad faith. Perhaps it is unnecessary for me to inform the Court that we are not asking anything in bad faith. We honestly desire a full and fair hearing for our client in this court at some time. The way the matter rests in my mind is this. There are proceedings pending before the Governor for extradition or rendition of Mr. Thaw. We want to present all of the questions at the proper time in this court. Now under our liberal mode of procedure in this state and in this court it seems to me that all of these questions may be properly raised upon this single writ of habeas corpus now pending before this court. If this case today is continued to some such time as Your Honor may name pending the proceedings before the Governor and Council, it may be that the officer at a later date should and could, —or could and should, —make a further return that he is now holding the prisoner in case of the granting of an executive warrant upon an executive warrant from the Governor. It might be that we would have to answer that petition in this

same proceeding or reply to that answer in this same proceeding, then all of the questions necessary for the final determination of this question now pending would be properly before this court. And it is here that we desire to carry this matter along. It is here that we desire to have a final determination, in the federal courts, of the question whether Harry K. Thaw is properly held, and whether this warrant and this proceeding which the state of New York has instituted is, in fact, a subterfuge to get Mr. Thaw and take him back for commitment to Matteawan, or whether they in good faith intend to try him upon the trivial complaint which has been made before Your Honor, and which we say does not in fact set out any offence against the laws of the state of New York. Now we have not been able, as I understand from my Brother Shurtleff,—the requisition of the Governor of New York was not filed at Concord until yesterday, some time yesterday forenoon,—we have not been able to obtain copies. We do not know whether it is in the form set forth in the writ upon which Mr. Thaw is held at the present time or whether they have charged some new offence; in fact we are entirely in the dark as to the proceedings. They charge us with bad faith in coming before this court. I assure the Court that there is absolutely no bad faith on our part. That it is an honest intention on our part to get these questions properly before this court. We were not unmindful of the section of the statute of the state of New Hampshire which provided that the Governor might issue his executive warrant to be executed forthwith, or he might issue a warrant to be executed at some future date. In that instance we would have had time, of course, to have prepared a writ of habeas corpus and brought it before this court. But if that executive warrant had been to deport Harry K. Thaw forthwith, there would have been absolutely no opportunity on our part and we could get no assurance from Brother Jerome that he would wait a moment in case such an order came from the Governor. Now under those circumstances it was no more than justice to our client and in furtherance of our desire that he should have a fair and impartial hearing before this court that we should proceed at once under a writ of habeas corpus

from some court, and we went to the court where we desi
to have this question tested, and it seems to us under our pra
tice here that it can all be tested in this court.

COURT: One moment, Brother Morris. I want to kno
whether Mr. Jerome intends to raise the issue of bad faith. I
so there must be some issue framed with reference to it, an
that must be heard. But I think when we consider the ful
situation in a comprehensive sense that a proceeding of thi
kind should not be attacked as fictitious or in bad faith; because
if I read correctly the expressions of the Supreme Court, they
enjoin upon the federal authorities the imperative duty, when
any man in custody complains that he is restrained of his liberty,
of issuing a writ unless it clearly appears upon the face of his
petition that the process is in all respects legal. And Mr.
Jerome can understand, as well as anybody, that it would be
utterly impossible, and obviously unreasonable, for a Judge to
assume that a process, mixed as this is, should be accepted as
due and legal without hearing the parties. Now I make these
two general observations about this case. The writ having
been issued there would be no purpose on the part of the federal
government or its officials to in any way interfere with a rea-
sonable investigation in the state courts or before the state
executive and, if I understand the other view correctly, the
same disposition of comity is manifested by the state authorities,
both the courts and the executive, when they reach their part
in respect to sharing duty. Executive orders are generally
subject to the opportunity of presenting legal questions. It
might be by habeas corpus. Might be upon broader proceed-
ings raising issues of fact either in the state or federal courts
with a view of determining rightfully and in a proper way
whether the situation is such that a party who is proceeded
against should be extradited. Now if under these suggestions
you desire to raise the issue of bad faith, that would present a
collateral issue of fact which I should feel bound to hear. But
unless you have a pretty strong case it is probably not advisable
to trouble yourself by doing it.

MR. JEROME: The information that came to me—

COURT: I don't mean disrespect, at all, to your position.

MR. JEROME: I appreciate the position of Your Honor. Let me say right at the outset of what I am about to say, that I, myself, could see how the federal court could have no option on that petition to do other than issue a writ; it seemed to me plain that the court would have to do it. But the only basis that I had for the statement that I made was the remarks, direct statements, made by a loquacious attorney who perhaps by no means—

COURT: Well, I wouldn't—

MR. JEROME: —could bind himself to commit the others.

COURT: I wouldn't characterize the attorney in that way, Mr. Jerome.

MR. JEROME: I will withdraw the remark. But the remarks, whatever Mr. Morris or Mr. Shurtleff state in this case, and Mr. Shurtleff stated to me yesterday that it was his intention, I accept without any question at all, sir. I accept it so fully that, Mr. Morris said that he wants these things submitted to the federal court, I am perfectly willing to withdraw any opposition to a continuance for any time that suits their convenience, and submit the question to this court.

COURT: Well, so far as I would express any preference about the matter, it would be that such questions as can be raised and perhaps will be raised could be better raised in the state courts, but I don't shrink any duty imposed upon myself as Judge of the federal court. Now we may as well come to the point. Do you desire to raise that issue?

MR. JEROME: Of bad faith?

COURT: Yes.

MR. JEROME: Not in view of what Mr. Morris has stated. I accept anything Mr. Morris will state as absolutely correct.

COURT: Very well. There are some matters in respect to the custody, and some matters in respect to the answer which we will need to talk about a little later on. My impression is that in order to have the pleadings perfected that it will probably be useful to counsel on both sides to take further time and consider whether the New York process by which Thaw was held should not become in some way a matter of pleading here. I don't know how broadly,—this writ of habeas corpus is rather

limited in its scope. It doesn't warrant, at least it may not warrant, an investigation of all the questions which may be material to the rights of the petitioner and to the state of New York. After I have determined what shall be done here we will talk about that a little more. Then you are not to press the issue of bad faith, Mr. Jerome.

MR. JEROME: I am perfectly willing to oppose no motion. I understood that the application to Your Honor by Mr. Morris or Mr. Shurtleff was for a continuance here, adjournment to another date. I think, though, that it would be no more than fair, if this thing is to go over without opposition, that they should be willing to stipulate, to submit it to Your Honor at any day of your own selection that Your Honor will give them, and stipulate if not litigated at once before Your Honor not to go then into the courts of the state of New Hampshire to litigate it over again. That would seem to be a reasonable stipulation to ask.

COURT: I don't think the Court in a case like this would be controlled at all by any stipulation in that respect. The immediate question, as I understand it, is whether the hearing shall proceed here now. I understand Mr. Shurtleff and Mr. Morris to state that they want a suspension, not a continuance as I understand it, but a suspension. You say you want a hearing?

MR. JEROME: I should like it, yes.

COURT: Well, I think if I proceed with a hearing with the extradition proceedings pending, I shall do precisely what the Supreme Court of the United States has repeatedly said should not be done. As I understand the rule, it is that a proceeding of this kind having been once instituted, that it should be suspended or held in abeyance out of deference and under the rule of comity which exists between the federal and state governments.

MR. JEROME: I certainly would not press your Honor in any direction where you thought it was against the judgment or decision of the Supreme Court of the United States; it would be probably useless and ridiculous to do so.

COURT: There is perhaps nothing further to be said and I may

as well dispose of the case in a general way. In view of the complications, — and there are complications, because here is one party insisting before the executive of the state upon an immediate or speedy extradition, while the other party stands upon a writ of habeas corpus in which he alleges that he is held in violation of the federal constitution,—I have deemed it advisable to state in writing the reasons for suspending this proceeding. We have a situation which imposes upon the authorities the duty of proceeding in accordance with law, and to discharge the obligations upon them, and, saying nothing of the public interest in this question, in view of the fact that there are two proceedings, one before the State executive and another in the federal court, to which, if the text books and the decisions are to be respected at all, might take precedence of everything else, still, it is with the qualification that it should temporarily yield, at least, to the proceeding under the state authorities. And in view of such pendency of extradition proceedings, I have thought it my duty to hand down a reseript at some time, when counsel have said all that should be said here, which will make it perfectly understood as to what relation this proceeding sustains to the one which is pending before the executive of the state of New Hampshire. If everything has been said that counsel desire to say, I may as well dispose of the case now, and then we will come to these questions as to the pleadings and the question as to the custody of Thaw pending these investigations.

MR. JEROME: We have nothing further to present to Your Honor.

MR. SHURTLEFF: What was the suggestion, Your Honor, about the custody of Thaw?

COURT: Well, later that will come up, as to the custody of Thaw, that is, as to how it shall be safeguarded and controlled pending the investigation.

RESCRIPT.

[September 16, 1913.]

ALDRICH, J.

Apparent uncertainty of counsel as to the effect of the pendency of this writ upon proposed extradition proceedings, and the possibility that the state authorities may be in doubt as to the reasons for not proceeding summarily to determine the question of discharge or no discharge, make it justifiable and advisable to file a rescript which shall explain the action taken here and the grounds for it.

It is understood that the state of New York is seeking to have the petitioner, Harry K. Thaw, returned to that state under the executive authority of the state of New Hampshire, and that he has been held in custody under New Hampshire state process to that end. The person so restrained institutes habeas corpus proceedings under federal law, in which he alleges that he is held in violation of the federal constitution and laws, and particularly in violation of the 14th Amendment in respect to due process and liberty.

This proceeding does not expressly involve the proposed extradition hearing before the state executive, yet it concerns it indirectly in the sense that if this hearing should go forward and if it should be determined here that the process under which the petitioner is held is not constitutionally due process, and that the restraint is therefore illegal, it would doubtless be contended that the result should be accepted as conclusive of the question of the right of extradition under the existing state process.

The rights of the state of New York are not of such urgency as to justify summary and precipitate action here in advance of the usual and proper course of interstate extradition proceedings, and the petitioner having invoked federal protection for the purpose of saving his federal rights and of not waiving them, does not now insist upon his constitutional right of a speedy hearing and a speedy test of the question of the legality of the state restraint, and having thus safe-guarded his rights, through his counsel, yields to the idea of a postponement of this hearing to the end that extradition proceedings may go forward before

the state executive in the ordinary and usual way. This is a perfectly proper course for counsel to pursue. It is in perfect harmony with our system of federal and state interrelations. It involves no yielding of the idea of the paramount authority under the federal constitution, and is strictly within the spirit and the reasoning of the Supreme Court in Ex Parte Royall (117 U. S. 247–253), and other Supreme Court cases.

What law and justice may require is often an embarrassing question for courts and other officers before whom persons are brought for such purposes as exist in this case, and in this particular case whether the character of the custody in New York, prior to the alleged escape, where, as is alleged, the petitioner was restrained in an institution because of insanity or something like it, rather than for crime; where the offense for which he is sought to be extradited consists in his compassing his escape; whether the warrant of commitment under which the petitioner was held in New York, and whether, under the circumstances of this case, the question of extraditable crime, which is a mixed question of law and fact (161 U. S. 502), are involved among other things in the question of constitutional due process, at once present more than the usual novelties and difficulties and their proper solution will require careful and painstaking consideration.

Under the colonial system there was no such thing as extradition of fugitives from one colony to another, except under imperfect compacts in the nature of treaties. Nor was there between the states until the Articles of Confederation, a source from which power of extradition was derived. Subsequently the Federal Constitution, through the second section of Article 4, defined and established a definite source of power with reference to extradition from one state to another, which section is as follows:—

> "A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime."

Following this there was Congressional action which imposed upon the states certain regulations and duties in respect to extradition, and, without much change, the regulations and duties are now defined by Sec. 5278, page 3597, Vol. 3, U. S. Comp. Stats., which corresponds to the same section of the Revised Statutes of the United States. (Rev. Stats. page 1022.)

As repeatedly expressed by the Supreme Court and the highest courts of the various states, interstate extradition is now regulated by the federal constitution and laws in pursuance thereof. Generally speaking the states have recognized the power of extradition as emanating from federal source. This is particularly so in respect to New Hampshire, the state from which the person in question is sought to be extradited, because Section one of Chapter 263 of the Public Statutes of New Hampshire (page 706), provides that: "Whenever a person in this state is charged with an offence committed in another state, and is liable by the laws of the United States to be delivered over upon demand of the executive of such other state, etc." It is thus seen that New Hampshire expressly recognizes the laws of the United States as the foundation for extradition, and this view is fully accepted by Judge Walker, who delivered the opinion of the Supreme Court in *State* v. *Clough*, which is popularly known as Mrs. Munsey's case.

While the Supreme Court decisions sustain the federal power, in the broadest sense, in a situation like this, where it is alleged that the party is restrained of his liberty in violation of the constitution and the laws of the United States, as well as the view that hearing on habeas corpus may in an extreme case proceed summarily and speedily, for the purpose of testing the legality of the restraint, still, if I understand the scope and theory of them, they also sustain the doctrine of a broad, practical discretion, when the party invoking the federal law is held under state authority, upon the question whether the interests of government and of the parties concerned, require that federal courts shall proceed at once to determine ultimate rights; or whether, without relinquishing federal authority, considerations of usage and comity require suspension of a given proceeding for

the purpose of allowing the state authorities to deal with questions of extradition; and the reasons for federal suspension are especially weighty where the person invoking the writ does not insist upon pressure of federal instrumentalities.

This is upon the theory that the state authorities, executive and judicial, are charged with the same duty as that of the federal authorities in sustaining the provisions of the laws of the United States, so far as they apply to given situations which involve questions of interstate extradition.

It is perfectly obvious, in respect to a proceeding involving proposed extradition, that some findings of the executive of a state might be accepted as conclusive and binding upon both state and federal courts, and it is equally obvious that questions might arise before the executive, where its action would not be binding upon either. Upon the question as to what findings would be conclusive and what not conclusive I make no intimation whatever.

The reasoning of federal and state decisions which sustain this view of suspension or delay of federal process, even where it is alleged that the restraint is in violation of the federal constitution, is based upon the idea that if investigation by the executive results in denying extradition, that the aggrieved person would be set at liberty and thus there would be no necessity for interposition of federal instrumentalities, while if the result there were to be different, it would still be open to federal authority to afford such protection as the constitution and laws of the United States require.

Holding pendency and control of this proceeding, under suspension, menaces neither the rights of the parties concerned, nor of state authorities. The proceeding is based upon a right which rests with every person restrained of liberty, and delaying the hearing, under the circumstances to which I have referred, is for the express purpose of allowing the state authorities, upon whom under our system equally with us rests the obligation to guard enforce and protect every right guaranteed or secured by the constitution of the United States and the laws made in pursuance thereof, (117 U. S. 248) to go forward with attempts to

legally solve the questions involved in the contest between the state of New York and the petitioner.

Under our system of federal and interstate relations, the fullest measure of comity exists in respect to extradition proceedings, and while there is no rule of comity which justifies extradition, unless the constitution and the laws provide for it, the spirit of comity between the federal and state governments is such that each assumes, with respect to the other, that proceedings will be in accordance with the supreme law of the land, and it is understood that this practical and wholesome view holds until some question is evolved which reasonably presents a situation which justifies a review under proper proceedings.

Such considerations make it justifiable, the custody of the party petitioning for the writ being properly safe-guarded, that the hearing under the writ before us be suspended to the end that the executive of the state shall have a free hand in respect to the extradition investigation contemplated by the constitution and the laws.

Under such suspension as may be deemed advisable under these suggestions, it must be understood that it is open to the petitioner, at any time, to press his alleged constitutional right of an immediate hearing. It is likewise open to counsel representing the state of New York or the state of New Hampshire to move, at any time, for a hearing or for a dismissal of the writ.

The parties will consider whether the pleadings contemplated by the federal statutes should be perfected within the statutory period, or whether those are matters which go along with the suspension.

Under the decision of the Supreme Court in *Barth* v. *Clise, Sheriff*, (12 Wall. 400), as the body of the petitioner has been produced, the control of his person must be treated as within this proceeding, subject to recommitment to state authority, to be held to bail or placed in the custody of suitable keepers. My inclination is to appoint keepers, and to appoint Mr. Nute, the Marshal, and Mr. Holman A. Drew, as such a custody will be most convenient for all, at least during these hearings.

Counsel will confer upon this question of custody.

(Following reading of Rescript)

MR. MORRIS: Your Honor, I would say that the custody suggested by the Court is satisfactory to us.

MR. JEROME: Entirely so to us, sir.

COURT: The statute requires imperatively a return or an answer to the writ. But my view is that that is something to be treated in a practical sense, and I make the assumption, of course, that all counsel, concerned in the interests involved here, desire in all reasonable ways to have the issues properly framed, and it may be as well to let this question of perfecting the pleadings go along with suspension and treat it as something open to amend if you desire it, enlarge it if you desire it, or stand upon it as you have framed it here. You are satisfied with the proposed custody, Mr. Jerome?

MR. JEROME: Entirely so, sir.

COURT: It is understood, of course, that these keepers are appointed under the authority of this writ. If counsel will examine this case against a sheriff to which I have referred it will be seen that the responsibility of the sheriff as such is suspended altogether, and as keeper he stands here acting under federal authority. That seems to be the rule in order to protect one interest as well as the other. You understand it to be that way, Mr. Jerome?

MR. JEROME: Perfectly.

COURT: Now then, the keepers will of course employ such force as they deem necessary to safe-guard the custody of the petitioner; they will give him all reasonable opportunities to confer with counsel; they will go to all reasonable places where the State authorities require his presence, in order that the proceedings there may go forward conveniently. Anything further to be said?

MR. JEROME. Nothing, sir, on our part. I might ask this. As I understand the intimation of Your Honor,—which would be entirely agreeable to us,—it is that the framing of any further pleadings in this matter, or further amending the return, may be suspended until the question of the hearing comes up.

COURT: My idea about this hearing is this, that it is not adjourned; it is still on.

MR. JEROME: Just suspended.

COURT: Merely suspended. The statute, as you are aware, requires the return to be made within so many days. But as I understand it you have made a return, and that being so I think I am right in saying that it may be enlarged or may be perfected. Of course there is something to be done by the petitioner by way of replying to this answer. I think if no one objects, it may be as well understood that the matter of perfecting the pleadings is suspended until some one makes some motion about having them perfected. Unless you deem the statute imperative that you should do it within a given time. *(Reading)* "When a writ is returned a day shall be set for a hearing of the cause not exceeding five days thereafter." The person to whom such return is directed shall make return within three days thereafter, and so forth.

Well now he has made his return, as I understand it. I think it is perfectly open, especially upon consent of all parties interested, to give you further time if you want it.

MR. JEROME: I took it, sir, that it would be proper procedure. You see as yet, from the intimations of Your Honor and the rescript that you have, that it would appear, naturally, that no hearing would proceed in the federal court until the decision of the Governor. And Your Honor's intimation, while not intimating what effect it has stated as a legal proposition that questions of fact or law might arise before the Governor which would be taken as adjudications, so it might become important before a final hearing on this to put in an amended or further return setting forth the proceedings before the Governor.

COURT: Yes.

MR. JEROME: The return now in is strictly correct up to the time of making it. Subsequent proceedings may occur that would render it desirable for the sheriff to return that since,—he makes further return to the writ, that since the return made in obedience to the writ following facts and circumstances have arisen which he begs to present in determination of the issues involved.

COURT: Well, I have simply thrown out the suggestion as to the pleadings. You must examine the question and act on

your own judgment about it. As far as the prisoner is concerned, I think the statute contemplates, at least the decisions do, that they shall make some reply; and that they may traverse certain of the allegations and so on. And if the matter of pleadings is to remain open it is by common consent, as I understand it. I wish to say in conclusion of the disposition of the matters here today that my object, as counsel will readily see, in making definitely known through a rescript what is done here, was to give the authorities of the state to understand the precise situation and precisely what is being done in this proceeding. It has been represented to me that the Governor had expressed some doubt as to whether he should proceed or not until he understood perfectly what the effect of the action was under this petition. I therefore felt it incumbent upon me to have it understood through a rescript. It is right that counsel for all interests should understand it, too.

Mr. Morris: One word, Your Honor, with reference to perfecting the pleadings. I suppose perhaps it may follow as a matter of practice, of course, that when Brother Jerome files any further answer or pleadings that we may have a copy of it and such time, reasonable time, to answer as may be necessary.

Court: That, of course, is true. I don't wish it to be understood that I have suggested the propriety or the necessity of your enlarging your answer at all, Mr. Jerome. I merely throw out the suggestion that you may consider it. And then it is probably open to counsel for the petitioner to raise questions whether this New York process under which Thaw was held as an insane person should become a part of the proceedings at issue, because under the limited scope of a habeas corpus proceeding it is a question whether that becomes something to be considered upon the question, whether the process under which he is held here is due process. The novelty of the situation, as everybody must see, results from the fact that he was held in an institution in New York under process against him as an insane person, and the offence or crime upon which it is sought to have him extradited consists, according to their own account of it, and their own description of it, in his escape from that institution. Now whether that is a crime, whether the state

of New York, holding a person as an insane person is in a position to set up his escape as a crime within the meaning of the federal constitution and of the state authorities? If you have found anything in the books, Mr. Jerome, on that question you have done better than I have. It seems to me that it involves a novel proposition.

MR. JEROME: If I understand your Honor right the proposition would seem to look to the point of whether a person of unsound mind could be charged with criminal responsibility.

COURT: Well, I am not making any—

MR. JEROME: But since the rule in Norton's case, which we have practically enacted into a statute, and which I understand to be the rule in insane cases in federal jurisdiction, the rule laid down in Czolgosz case and the Guiteau case, that if a person knew the nature and quality of the act and that it was wrong, it did not matter whether he was sane or not.

COURT: There results the novelty. The question comes whether it is not open to the petitioner here to raise that question of fact in the state courts of New Hampshire.

MR. JEROME: Well, I submit—

COURT: To raise issues of fact for the jury which present that question of mental responsibility. I don't intimate anything one way or the other about it, but you seemed to assume at the outset that the questions were entirely clear. I don't think they are.

MR. JEROME: They are not clear if those questions are open, but I think on the argument I will be able to show to your Honor decisions of the federal courts in extradition that the door is closed to Your Honor's investigation of those questions. That is what led me to say that in my opinion it was simple. If we had to go into those questions it would be by no means simple, nor brief.

COURT: I wish it to be understood that I am making no intimation as to what I think about the question when I say it is novel. But if you stand upon the position that extradition is justifiable provided Thaw was of sufficient mind to commit a criminal act at the time he escaped from Matteawan, you put a qualification upon your proposition at once. Now where is

that question of mental condition within the meaning and scope of the extradition law to be determined, in New York or in New Hampshire?

MR. JEROME: We shall probably—

COURT: In New York or in New Hampshire, the state which you are asking to forcibly extradite him?

MR. JEROME: We shall probably contend before Your Honor this, that there are three questions, there being no contention that the statutes as I understand it either of New York or New Hampshire are unconstitutional, that the door is closed to Your Honor's investigation except on three questions.

COURT: Well, is it closed?

MR. JEROME: That is what we shall contend.

COURT: Is it closed? When one sovereign state asks another sovereign state to forcibly seize a man and carry him across the line to another jurisdiction is any question closed?

MR. JEROME: If we understand the decision, the unanimous decision of the Supreme Court of the United States in the Pease case, in the 207th U. S., we think it is. We think that all that will be open for Your Honor's investigation will be "Is he charged with crime?" "Was he in the state at the time of the commission of the crime and now found here, and is he the person mentioned?" The supreme court having gone so far as to say in that case, conceding that the indictment was demurrable and bad—

COURT: I think you are perfectly correct in that proposition as a general one, but when the papers show that one is charged with a criminal act and that that act is involved in and solely grounded in the escape from a warrant which holds him as an insane person, have you cases which hold that he would be extradited as a criminal?

MR. JEROME: We have cases that hold as you have in the federal jurisdiction that an insane man is held to criminal responsibility. The most striking case in our state was where a man conceded by the district attorney to be insane was convicted of murder in the first degree and put to death because it said that while he killed under an insane delusion, the insane delusion was not one which, if true, would justify his acting.

COURT: What was the process there?

MR. JEROME: Indictment, trial, conviction, sentence, electrocution. You see, sir, our contention is, and we think we can show you authorities that will lead you to the same conclusion that we have, that all the federal court looks at is "is there a charge" and that under the federal constitution the word "charge," as was said in this Pease case, is not whether it is well founded or not. That it would be impossible for the federal courts to go into that question because it would be in substance to give every man two trials when he was on an extraditable offence.

COURT: I entirely agree that if there is a charge of crime and there is no question about it, no fact appearing upon the record or in the papers which impinges on that allegation or charge of crime, that that is quite sufficient. But whether when in describing the crime which is charged the description of the crime necessarily involves, the fact that he was held under insane process qualifies it at all, is the query.

MR. JEROME: Except that the prisoner doesn't come before you alleging that he is insane.

COURT: The petition shows that.

MR. JEROME: Not that he was insane.

COURT: No, but that he was held under insane process there.

MR. JEROME: Until he was discharged by due process of law.

COURT: Well, the papers somewhere show that he was held under insane process. I don't use the exact words, but that is the idea. It is in the record somewhere if it isn't (I think it is) in the petition. Now there is really no question for further discussion except as it may arise as to what further should be done in respect to pleadings. But I will say that counsel on both sides better examine cases which involve indictments and trials of issues of mental capacity and see how far they apply to similar questions involved in extradition proceedings where one state is asking another to exercise its authority for removal to another jurisdiction.

MR. MORRIS: May it please the Court, one further suggestion as to the perfecting of the pleadings. Of course we can not foresee just exactly what may be filed on the other side, and something might arise which would require us to amend our petition.

COURT: Yes.

MR. MORRIS: And we would want to reserve the right to do that.

COURT: Well, I think Mr. Jerome should determine within we will say three days whether he will amend, or whether those interested for the state of New York will enlarge or amend their answer, and then you take how many, three days more?

MR. MORRIS: Yes.

COURT: Will that be enough? I will give you more time, Mr. Jerome, if you want it?

MR. JEROME: Abundance of time, sir.

COURT: Well, you may make it three days, Mr. Hodgman. And if you want more time, Mr. Jerome—

MR. JEROME: I will apply for it.

COURT: You ask for it and you will get it.

MR. MORRIS: You mean three days after notice?

COURT: Yes.

MR. JEROME: Will Your Honor set any definite time, then, for a hearing, or have it brought up on notice?

COURT: No, I can't say. The hearing is open under the circumstances which I have stated, and it is open to any party interested to ask for a hearing on any question that they may wish to have heard. Now if there is nothing further the keepers will take the prisoner into custody.

(Recess to 2 o'clock, P. M.)

MR. JACOBS: May it please Your Honor, this morning you gave the State of New York three days in which to file an amendment or additional return on the writ. Now at that time it was thought that there might be a hearing before the Governor some time this week, possibly tomorrow or Friday. Now since

then, since the adjournment this morning, the Governor has designated next Tuesday morning as the time for hearing, and therefore, if Your Honor pleases, we would like to have until a week from Thursday, something like that,—that would be the 25th,—in which to file an additional answer.

COURT: Any objection to that?

MR. MORRIS: No, Your Honor.

COURT: Well, the time for amending the answer in the Thaw proceeding is enlarged by consent to September 25.

MOTION OF THE STATE OF NEW YORK TO DISMISS PETITION.

[Filed November 8, 1913.]

In the above entitled matter, the State of New York hereby moves that said petition be dismissed.

THE STATE OF NEW YORK,
By its Attorney,
BERNARD JACOBS.

Nov. 8th, 1913.

RECORD OF PROCEEDINGS AT CONCORD, NOVEMBER 18, 1913.

THE CLERK. In the matter of the petition of Harry K. Thaw for a writ of habeas corpus.

WILLIAM T. JEROME. We consent that the petition for a writ of habeas corpus be sustained and the prisoner be discharged from the custody under which, by the petition and the return to the writ, he appears to be under.

We ask that the entry of the order to this effect be delayed until the sheriff of Coös County, who has the warrant with him issued by the governor of the State of New Hampshire, shall return from the hotel where the warrant seems to have been carried.

THE COURT. State that again, Mr. Jerome. I didn't quite understand.

MR. JEROME. The situation, sir, is this: That when the relator in this writ was arrested in the county of Coös in this state, he was arrested as a fugitive from the justice of the State of New York, and thereafter proper papers were forwarded to New Hampshire, charging him with the commission of the crime of conspiracy. At that time no indictment had been found against the relator in the state of New York, but a Supreme Court judge of the State of New York had sat as a magistrate and upon depositions had issued his warrant for the arrest of the relator for the crime of conspiracy. He was held here in the State of New Hamphsire to await the proper papers in extradition, or interstate rendition, under the constitution and the revised statutes of the United States. While being held here as a fugitive from justice, the only charge against him being a charge before a Supreme Court judge sitting as a magistrate in New York, he sued out a writ of habeas corpus in this court. That writ, as we understand it, brought before this court the cause of his detention—not the cause of *any* detention, but THE cause of that detention, which was the only detention he was under in the State of New Hampshire or anywhere else. Upon the return to that writ, the respondent, the state of New York in this case, or rather the sheriff of Coös County, set up that he was held as a fugitive from the justice of the State of New York, and this court, pending a decision of the governor of the State of New Hampshire, upon the question of whether or not the governor of the State of New Hampshire would grant the requisition of the governor of the State of New York, which later was to come, for the surrender of Thaw as a fugitive from justice, this court suspended all proceedings in the matter and placed the relator in the joint custody of the marshal of this district and of the sheriff of Coös County, Holman Drew. At that point all proceedings in the federal court were suspended. Thereafter a requisition arrived in due form—a requisition made by the governor of the State of New York upon the governor of the State of New Hampshire for the surrender of Thaw, because of the crime with which he was charged before Mr. Justice Morschauser, a justice of the Supreme Court sitting as a magistrate. Later on, the grand jury of the County of

New York in the State of New York indicted Thaw, and a new requisition was forwarded to the governor of the State of New Hampshire. That requisition not only demanded the surrender of Thaw, but in compliance with the recognized practice and the statutes had annexed to it a copy of the indictment found against Thaw, together with a certificate of the State of New York that such indictment was authentic as required by the provisions of the revised statutes.

Thereupon further hearing was had before the governor of the State of New Hampshire, and the governor of the State of New Hampshire honored that last requisition—not the first one, but the last one. This court was only concerned with the detention of Thaw under the original arrest. That was all that appeared in the petition; that was all that appeared in the return, and the only question before this court was his detention under that original arrest, lawful or unlawful.

There is not now, nor has there at any time been, before this court any question of whether his detention under the warrant of the governor of the State of New Hampshire honoring the request of the governor of the State of New York, was lawful or not, because he has never as yet been detained under that warrant. The governor of the State of New Hampshire has honored the requisition of the governor of the State of New York. He has issued his warrant for the arrest of Thaw as a fugitive from justice, and the governor's warrant issued to the sheriff of Coös County and all other sheriffs and under-sheriffs and deputy sheriffs of this state. He directs that before Thaw shall be turned over to the New York authorities, pending that requisition, he shall be given opportunity to swear out in the state courts a writ of habeas corpus, if he so desires.

THE COURT. Is it limited to the state courts?

MR JEROME. I don't recall whether he limits it specifically to the state court but undoubtedly whether he so limited it or not, the prisoner would have a perfect right to swear it out—to petition either the state court or the federal court, should he be so advised. That is an option which he has which cannnot lawfully be taken away from him.

Now under that warrant in the hands of the sheriff of Coös County for execution, the sheriff who has been made by this court the joint custodian of this prisoner, no arrest has been made. We concede that it could not with propriety be made while the prisoner was in the custody of this court; at any rate, not except by the direction and consent of this court, so that any effort to execute that warrant has been suspended.

The only question on the old writ before your Honor is whether or not this prisoner was lawfully detained in the original proceedings instituted before a justice in the town of Colebrook. Inasmuch as our effort to have this prisoner returned to the State of New York is going to be wholly based on the last requisition before the governor of the State of New Hampshire, there is no reason why the validity or invalidity of that original arrest should be gone into. The prisoner is here in custody.

The moment that he shall be discharged by this court, he would be arrested on this warrant of the governor of the State of New Hampshire.

Now, there is no desire on the part of those who represent the respondent and the State of New York in this matter to endeavor—such an effort would be futile, if it were desired—but there is no desire or endeavor at all to strip this court of jurisdiction. Inasmuch as this prisoner must be detained here by the sheriff a reasonable time in order that he may elect whether to sue out a writ in this court or in the courts of the state—a writ of habeas corpus—we feel that the proper procedure in this case is that the original writ should be sustained; that the arrest of the prisoner under that he should be relieved from, so that the record be entirely clear that then the sheriff of Coös County would execute his new warrant by taking the prisoner into custody.

The counsel for the petitioner, if they are advised that they desire to sue out a writ of habeas corpus in this court, may at once present their petition for the same, a petition which I believe has already been prepared, and this court may issue its writ of habeas corpus, and these questions may be argued here, but I can see that the proper practice would be to get rid of this former arrest with which now no one is particularly

concerned; and so, on behalf of the respondent and on behalf of the State of New York, we consent that the writ now pending in this state be sustained and that the prisoner be discharged from custody in reference to which the petition upon which that writ was issued relates.

We then desire that before Your Honor shall determine whether or not to go into an inquiry into the question of the lawfulness of the detention of this man under the warrant of the governor—something that he is not held under now—whether your Honor would hear us on this question and whether or not the proper procedure is not in a case of this kind—whether the proper procedure in view of certain decisons of the Supreme Court of the United States would not be for them to exhaust their remedy in the state court, and then, if they were denied or thought they were denied justice in that court, go to the Supreme Court of the United States by writ of error.

As I understand later decisions of the Supreme Court of the United States, while maintaining everywhere the authority of the federal courts in cases of this kind, to intervene by way of writ of habeas corpus, the intimation—undoubtedly plain words as I read them of the Supreme Court of the United States, are to the effect that excepting in extraordinary cases—and they cite, for instance, the case of that United States marshal who killed a man in California in protecting the life of Mr. Justice Field of the Supreme Court, and several similar cases—that the real and preferable practice in the federal court, where no emergency is shown and no reason to believe that justice will be denied in the state courts, is to remit these questions in the first instance to the state courts, giving them their relief ultimately, if it be necessary, either by habeas corpus or by writ of error to the Supreme Court of the United States. But however that may be, however susceptible to discussion that may be, it seems to me that with respect to the present situation we should first clear the record of any cumbersome matter which has no relevancy to the present contention. We therefore consent to the sustaining of this writ and to the discharge of the prisoner from the custody shown by the petition upon which this writ was granted, that he is in.

Now, unless we are to repeat the procedure which we were met with in Canada, when the prisoner himself petitioned for a writ of habeas corpus on the ground of his unlawful detention, and when he came into the Canadian court said he did not care to go out, although he was unlawfully detained, and the court informed him if he did not want to go out, there was no way they could put him out of the prison—it seems to me that when the other side consents that the writ which he claims he sued out for the purpose of securing his liberty, when we consent it should be sustained and that his liberty should be granted to him, that he should be freed from that imprisonment which he alleges is unlawful, that it is very difficult for me, from a lawyer's standpoint, to conceive why such a course should not be pursued.

I say again, sir, we have no desire—we have every desire to settle the questions which counsel think are worthy of consideration in this case, either in the federal jurisdiction or in the state jurisdiction, or in both, but to adopt that course of procedure which will most expedite the settlement of these questions, and of course under this warrant of the governor it would be necessary that the prisoner be detained here and afforded a reasonable opportunity in which he may sue out a writ in this court or sue out a writ in the state court.

THE COURT. Your reference to the Canadian situation reminds me of what I was reading the other day of process in Iceland, where a travelling party met with a lone pedestrian on the plains and inquired where he was going. He said he was going to the penitentiary, that he had the papers which the sheriff had furnished him, and that the sheriff had sent him all alone because it was less expensive. Two or three weeks afterwards the excursion party met the same man in the same place, walking the other way, and enquired the reason for it. The person under sentence replied: "They wouldn't let me in. I lost my papers. The keeper of the prison told me I must walk back and get new papers or stay out."

I think, Mr. Jerome, you have made a correct statement of the history of the proceedings so far as they have gone forward in this court, and the question, as it seems to me, is whether this

pending proceeding should be amended according to your suggestion at Littleton,—the pleadings completed, and that this extradition proceeding should thus stand as a part of the record, or whether upon your motion the writ should be sustained and the petitioner discharged,—

MR. JEROME. May I say this, your Honor?

THE COURT. Whether the order should be made discharging the prisoner.

MR. JEROME. May I say this in regard to that: That was very clearly my then impression, and it seemed to me a perfectly feasible thing to do, and that if it could be done, there was no need of multiplication of procedures, but I find this inherent difficulty, as it seems to me, from a legal standpoint, that until this prisoner is freed from his previous imprisonment and from the custody into which this honorable court has placed him, pending the decision upon the previous imprisonment, he is not in custody under the governor's warrant and cannot be. He must be first freed from the authority of this court as one awaiting a decision upon a writ of habeas corpus before the warrant of the governor of the State of New Hampshire can be executed. The controversy in this court, or wherever it is to arise, will arise over the legality of his detention upon the warrant of the governor of the State of New Hampshire, and so it seemed to me that until he could be taken into custody under that warrant, the writ of habeas corpus as applied to that warrant had no function, because it only lies where there be actual custody and not where there is fear that there will be in the future such custody. Before he can be lawfully gotten into the custody of the authorities of New Hampshire under that warrant of the governor of New Hampshire, it seems to me that we have got to get rid of this pending proceeding, and the proceeding will turn and should turn wholly upon the question.

THE COURT. Let me see if I understand your position. You recognize the fact that the proceeding at Littleton was suspended; that is, that the hearing was suspended, and theoretically that it has been treated as pending but suspended, to the end that you might take your further proceedings before the

governor. Your suggestion at Littleton, Mr. Jerome, was—and I thought at the time it was a logical one—that when you had done that, and provided the action of the governor should be favorable—that extradition should be ordered—that you would then amend your answer by stating the new authority under which you asserted your right to control the custody of the petitioner.

MR. JEROME. Your Honor is entirely correct, and that was my decided impression then. It had not occurred to me, or did not at that time occur to me that that would be futile, because the man would not be in custody under the warrant of the governor. The governor having issued his warrant, the man is not in custody under that warrant. I could not truthfully allege—amend my return. The impression, as we spoke in court, was that that would be entirely feasible, but, on reflection, I see that I cannot truthfully amend my return and have the sheriff of Coös County state that he is in custody under the warrant of the governor of the State of New Hampshire, because he is not and cannot be until he be freed from the custody into which your Honor has placed him and from the original custody.

I have no desire to be technical, but it seems to me these are jurisdictional matters. There must be actual custody.

THE COURT. Your motion is to the point, in effect, that the writ be affirmed, or that it shall operate, and that an order be entered declaring custody under the original state process illegal and that the petitioner be discharged; is that it?

MR. JEROME. From that custody, yes.

THE COURT. From that custody.

MR. JEROME. Now if the petitioners in this matter are willing to stipulate that there shall be stricken from the records—

THE COURT. Let me ask you a further question: Is it the purpose, if that order should be made, to seize the petitioner, or is it your purpose to give him an opportunity to file a new petition?

MR. JEROME. Our purpose is this, to have the sheriff of Coös County, the very minute he be freed from the custody that he now is in and from the former custody in reference to

which the habeas corpus applies—that the sheriff of Coös County in obedience to the warrant of the state of New Hampshire should take him into custody and keep him here any time that your Honor should indicate and would consider a reasonable time. There is no desire to do anything that is sharp or turn any quick corners. If counsel say here, we will take out a writ in the federal court, we will hold him for such time as your Honor deems proper to allow him to take that writ out. If they say they want him to take it out in the state courts, he is bound to hold him here under the mandate of the governor for a reasonable time to give him that opportunity.

THE COURT. I think your position a perfectly fair one. The only question is as to the best way of reaching the result, the result of raising the question as to the legality of restraint under the pending extradition proceedings.

MR. JEROME. I think counsel on the other side will inform you that they have already prepared a petition. There is no reason why that petition cannot be filed at once, while a writ of habeas corpus can at once issue on that on which we will immediately make return, and we are prepared to go on before your Honor. But it keeps then a distinct and clean cut record which I conceive is one which we are entitled to and which the orderly procedure of a court should desire should exist.

MR. MORRIS. This is purely a question of procedure. The warrant of the governor specified that a certain length of time should be given in which to take out a writ of habeas corpus for the protection of our client, to raise certain questions. That time expired yesterday. We refrained from filing any new papers at the latest date that we could under the warrant of the governor; feeling that we were not safe in waiting any longer, we did prepare and file in this court a new petition setting out the facts and circumstances which have transpired since the hearing at Littleton, anticipating that our opponents might make just the move which has been made to have the first writ dismissed, and not knowing what their purpose might be, but knowing now the motion to be perfectly fair, but we did not know but the move might be to have the first writ dismissed with the idea of hurrying Thaw out of the state, so we did file,

in accordance with the views which counsel, and we understood the court, expressed at the hearing at Littleton, a new petition setting out, as I say, all the facts and circumstances which have transpired since the last hearing, setting out the new requisition papers, two of which—three of which had been filed since the hearing at Littleton and only the last one acted upon. Now, as I said at the outset—

THE COURT. How many?

MR. MORRIS. Three independent sets of requisition papers have been filed since the hearing at Littleton. The first and second were not acted upon by the governor, but the extradition executive warrant was issued on the last set of papers which were filed, I think, the night before the decision of the governor was made, and the governor's order was that Mr. Thaw have until yesterday to protect himself by writ of habeas corpus which we have filed, drawn and filed in this court, setting out the proceedings so far as we could do it. The question of whether they might serve that executive warrant upon Mr. Thaw seems to me—the reason why, as given by our opponent, has no substance because this court ordered him into the joint custody of the marshal of the United States and Mr. Drew, the sheriff of Coös County.

THE COURT. Not that exactly. He was ordered into the keeping of Holman A. Drew and E. P. Nute, who as keepers were to hold him under federal authority. The suggestion was, and I think it is true, that the previous joint custody ended and that the responsibility of custody shifted upon the production of the man in court.

MR. JEROME. Might I suggest this, as it would probably meet Mr. Morris' objection: I conceive that the execution of this state process by Holman Drew while the prisoner is in the custody of the United States court would be entirely lawful if consented to by the judge of the district. Now, if the court would permit it, Drew would take into his custody, while the present writ is still pending, would assume to take into his custody by virtue of this warrant, the body of Harry K. Thaw; then Mr. Morris might sue his petition out at once, and then there was no question of any time here, any interval in which

any sharp practice could be resorted to, if that is what he wants to guard against.

THE COURT. This proceeding should be so ordered here that there will be no question but that the State of New York has fully saved its rights in respect to the proceedings before the Executive. I had supposed the idea expressed at Littleton would be carried out, and that the pleadings would be made complete through amendment to the original proceeding, and I can see that there may be reasons why it should be so. There may be recitals in those papers of consequence; at any rate, they are a part of the history of this proceeding. This proceeding is a part of the history of the case. I think counsel better consider whether the rights of New York cannot be saved by asserting its supposed right under the extradition papers and by making a demand for the possession of the prisoner, that fact appearing in the record.

If the prisoner should be finally discharged under this proceeding, the State of New York would have no occasion to use its extradition process, and if the prisoner's writ shall be ultimately dismissed, the extradition proceeding, being simply suspended, would then operate upon the situation.

MR. JEROME. May I ask this?

THE COURT. If there is any doubt about New York's saving its rights in that way, we will adopt some course that will save the rights of New York.

MR. JEROME. May I ask Mr. Morris this question: It may simplify. The petition which he has prepared, as he has indicated, as I understand him, and also applying for a new writ of habeas corpus in this court, does not that raise the questions which you desire to raise?

MR. MORRIS. Yes sir, excepting this point seems to be—I would say, Brother Jerome, that the new papers, while they are in the form of a new petition, they are filed in such a way as to be substituted or made a part of the former proceeding as a sort of amendment to the original petition, and they raise all the questions, I think, which we expect to raise in the proceeding, but there is one technical objection in them that perhaps in view of what has been said here this morning that should be

corrected. The governor gave until yesterday in which to file some sort of proceeding. Now the State of New York had not formally made an arrest of Mr. Thaw upon the executive warrant and has not, you say, yet done so, a fact which I did not know when the petition was filed. I did not know but what it was done yesterday. I supposed it would be done sometime within the time limited by the governor in which we could file our writ of habeas corpus, but on your statement this morning, it not being done, we have set out in the petition that he is held under this executive warrant which fact would have to be amended in our petition; otherwise I think it would be in accordance with the facts and raise the questions which we desire to raise.

MR. JEROME. As I understand you, Mr. Morris, you have in this petition so referred to the previous proceedings that they would be matters that you would ask this court to consider?

MR. MORRIS. Yes, certainly.

MR. JEROME. So that even though this court should take the view suggested by myself to sustain this writ and discharge the prisoner under that imprisonment upon a new writ of habeas corpus granted on this petition which you have prepared, those former matters would all be as if they were relevant, might be considered by the court.

MR. MORRIS. All of the history of the case I think is set out in our new papers, and we would not want to consent to any proceeding in this court which would eliminate all of the history of the case, because we deem it important.

MR. JEROME. We are not asking for that, sir. We are not asking the court beforehand to eliminate or decide whether anything that may be in Mr. Morris' petition is relevant or irrelevant. We only say, let us get rid of these previous proceedings which now jurisdictionally cumber the record, in order that these questions may be raised. I think you are in error when you say that the right to apply in the state court has lapsed, because I think on examination of the warrant you will see it runs from the period of the arrest.

THE COURT. Do you understand that the governor placed any limitation on the course to be pursued in the courts?

MR. MORRIS. No.

THE COURT. They sometimes suspend Executive warrants and make them not operative until opportunity is given—

MR. JEROME. No limitation.

MR. MORRIS. I do not understand that the governor can control the court, but he suspends the execution of the warrant; he did suspend the execution of the warrant until yesterday. Well, of course that is for the purpose of giving the accused time to file his writ of habeas corpus, and it seems to us that in order to protect our rights that we had got to file it within that time, and we did so.

MR. JEROME. Mr. Morris, with your Honor's permission, if I might ask you a further question: Would not this amply protect all your rights, if the court should grant this motion to sustain this writ and discharge the prisoner?

THE COURT. Not to discharge, but to sustain.

MR. JEROME. Sustain and discharge the prisoner from the custody that he was in; that Mr. Drew should go over and say to the prisoner: "I now arrest you under this warrant"; if you should at once file your writ of habeas corpus, pending the issuance of the writ, Judge Aldrich would at once recommit this relator to the custody of the United States marshal, pending the issuance, and the decision upon the writ.

MR. STONE. As intimated by our friend, the moment the prisoner should be discharged, he would be arrested by the sheriff; that moment we would perhaps make application for a new writ of habeas corpus. We wish to be heard saying that the jurisdiction was first in the state courts. Now there is no use of discharging and going through that. This court took jurisdiction of this case on this original writ. The writ was simply suspended with the right to renew it. We filed a supplemental petition setting forth additional facts only. That writ has been issued, and the defendant, or the petitioner, is in the custody of this court. He was not ordered into the custody of the sheriff of Coös County. The sheriff of Coös County was appointed as a deputy marshal to aid the marshal. He was ordered into custody of this court where he has been until this time. Now the mere form of service of the writ upon a petition

may be done at any time to take effect as soon as this proceeding is through, but to relinquish the custody of the petitioner to let him pass into the custody of the state, and then spend some time discussing the question of whether this court had jurisdiction to do what my learned friend admits the court has done lawfully would be a waste of time and cause unnecessary trouble.

It seems to me we are in the line of the hearing that took place at Littleton in renewing our motion for the discharge of the prisoner, not only from his arrest but from the custody of the agent of the State of New York, and we admit in this petition that he is in custody.

MR. JEROME. As a matter of fact, he is not in the custody either of the agent of the State of New Hampshire or of the agent of the State of New York, and we decline to take him into that custody. If counsel do not want to be facilitated, then we will have to stand on our rights and ask that the writ be sustained and the prisoner discharged.

THE COURT. There is apparently no disagreement between the two sides as to what is desirable, and that is, to put the record in such shape as will present the real question, or the real questions. As I have already said, I have been resting under the supposition that the pleadings would be perfected according to the plan suggested at Littleton, and I have also said that I should not insist upon that, unless it is certain that New York sustains its proper relation to the proceeding by doing it in that way. It may be difficult to see any reason why this thing should not be done, as you suggest, Mr. Jerome; on the face of it, it seems perfectly fair; but, on the other hand, there may be reasons which none of us can see, why it should not be done that way.

Here is a proceeding in which all of the difficult preliminary steps have been taken and in which there was a suspension in order that you should—that New York should do what it desired to do, to carry forward its application for relief before the Executive of the state. You have secured an order from the governor which I have not seen (I would like to see it).

(*Copy handed to the Court by Mr. Jerome.*)

in which extradition is ordered and conditioned upon giving the petitioner an opportunity to raise legal questions. I am stating this in a general way. Now, suppose you come before this court and present your Executive warrant and your papers, and say that you are ready to take him and move to dismiss this writ on the ground that you desire that the Executive warrant shall operate and be effective. Suppose I deny it, and you except, haven't you saved your question? Then you file your papers, as you are entitled to, in order to have the record complete; and suppose the other side by way of amendment—as was suggested at Littleton—in view of what you do here, perfects the petition by adding the new ground. Then we have the history of the case complete and there is no possibility of any mistake by anything being cut off.

MR. JEROME. I take it that we are entitled to proceed in this court and take such a decision rendered as will be *res adjudicata* upon the question passed upon by the court, it being *res adjudicata* in the strict sense, at least an estoppel of a re-litigation, it being conclusively estoppel that could not occur unless this court had jurisdiction. This court cannot conceivably have jurisdiction of an imprisonment that does not exist on a habeas corpus writ. That is a difficulty I find myself confronted with, which did not occur to me when I pressed your Honor at Littleton, at which time I stated exactly as your Honor has stated here, and was under the impression that this whole thing could be met by amendment. Now I want the adjudication in reference to the imprisonment of this man under the warrant of the governor of the State of New Hampshire, and I conceive that such an adjudication can only be recognized by habeas corpus by a federal court after he has passed into that custody and not before; that a writ of habeas corpus never lies to relief from arrest that may be or that is apt to occur or that is contingent or even that is feared or that is certain to occur; it only lies on the question of the legality of an arrest which has actually taken place. Anyway, I am indifferent to the form of procedure. If the form may be such that the actual legality of the custody of this relator, or prisoner now, may be raised, I can conceive of no legal device by which we can overcome the difficulty that occurs

to my mind now, except by an arrest of this relator. I conceive that without arrest it would be a bad precedent to establish. It would be a question, the legality of which would be open to large question, whether he could be arrested under a state warrant while in federal custody. I think it would be contrary to the precedent, sir. It would not comport with the dignity of our federal government if a prisoner in its custody should be taken into custody under state process. When he is relieved from that custody, he may be. I do not want to cumber the record. I do not want time. I do not want to give these gentlemen any embarrassment or extra work at all. It would simply mean extra work for me myself. I understand Mr. Morris to say that this petition which he has prepared covers all the points that would be litigated before your Honor. If that be so, the filing of that petition and the issuance by the clerk forthwith of a writ of habeas corpus returnable forthwith, certainly imposes no delay, no great effort, and clears this situation of all embarrassments.

THE COURT. The effect of such a course would be a proceeding *de novo*, going through all the preliminaries including the issuance of a new writ.

MR. STONE. It might change the question of the jurisdiction of this court by this procedure.

THE COURT. Then New York would have this court in the one instance sustaining the writ and ordering a discharge upon the ground that the New Hampshire state authority under which he was originally held was illegal, and then under another petition, and another possible writ of habeas corpus, I would be asked to hold that the restraint is legal. True, it would be on a different set of papers, but the same general question would be there.

MR. JEROME. What is your Honor's view on the subject? I am perfectly willing—Your Honor has had large experience in questions that involve federal jurisdiction which as a practitioner, a student, I have not had. I am perfectly willing to pursue such a course as your Honor may deem wise and proper. If in the end it should entail larger work upon us than otherwise would result, then we have got to do it; that is what we are here

for. Any intimation your Honor will give as to procedure, I am perfectly willing to pursue, although I think that procedure which I have intimated would be that which would have a saving.

THE COURT. I have no view which I am insisting upon. I am not magnifying or over-estimating the importance of my functions in this case. I think it is largely a question here of having the record in shape to raise the points involved in such a way that the Supreme Court can pass upon them.

MR. JEROME. If your Honor would do this: Let it appear on the record in your judicial capacity that you permit the sheriff of Coös County to serve this warrant upon the relator, then I can truthfully—then I am perfectly willing to consent that he could go and take him into formal custody, that Mr. Morris should file his supplemental petition, and I will make return to this writ, and then I can make this return, or have Mr. Drew make the return that the relator is in his custody, by virtue of it he is in his custody.

THE COURT. Will you qualify that a little and say that if that course is adopted, and if he is released and taken into custody upon the Executive warrant, that he shall be returned to the federal court?

MR. JEROME. Re-surrendered forthwith to the federal authority by order of court. If you will so direct on the record, I am perfectly content with that procedure.

These gentlemen do not seem to want to consent to do anything. If they will tell me what they will consent to do, I will do that.

MR. STONE. I do not want to interfere with the jurisdiction which this court obtained before the governor.

THE COURT. I think, Mr. Jerome, you should put your motion in writing, so we will have something to act upon. I think the rule requires that.

MR. JEROME. I will tell you to avoid all trouble. They come here and now ask to file a supplemental petition, and have filed such. Am I correct?

MR. STONE. Yes.

MR. JEROME. Then I ask for this afternoon, for the privilege

of filing a supplementary return, and let it rest just there exactly as they want it.

MR. MORRIS. That is very kind.

MR. JEROME. Otherwise, they will oppose a proposition which is advanced even for their own interest.

THE COURT. Now, let us not get off the point.

MR. MORRIS. Let us take up the proposition—

MR. JEROME. Your own proposition? If gentlemen not be agreed upon their own proposition—

THE COURT. We shall have altercation if we lose sight of the point we are considering.

MR. MORRIS. If Brother Jerome will state the last proposition, or let me see if I understand it, and that is, that it be made a part of the record at this time that this court assents to the service of the extradition warrant now upon Mr. Thaw; that thereupon our petition will be treated as filed; we may have to just amend the petition by changing the date; that will be all and perhaps changing the date of the filing, and that we proceed. Is that correct?

MR. JEROME. The way I understood it, sir, that by permission of the court, the sheriff formally places this relator under arrest under the governor's warrant; that he remain in the joint custody, as before, of the marshal and of the sheriff, subject to both processes; and that the court forthwith, or at such time as you file your petition, we file our return, and the court hear the arguments on the proposition.

MR. MORRIS. We see no objection whatever to that plan, and it will clear up the point which Brother Jerome has made.

THE COURT. I think the motion should be put in writing, Mr. Jerome—not this moment, but during recess—so that the record will show just what is done and the papers upon which it is done. We come in this afternoon at two o'clock?

MR. MORRIS. I would like to enquire whether or not it is expected that counsel shall go into a full argument of the case at this time?

MR. JEROME. I should be glad to. We may return the writ later, of course. My amended return will be simply a copy of this paper and the statement of the sheriff of Coös County that

he holds the custody of the prisoner by consent of the federal court by virtue of this authority, and I shall return nothing but the writ.

THE COURT. Perhaps I might as well state here as at a later time, that it is not my purpose to go into a hearing involving final arguments in this case today. I think, and I have no doubt everyone on both sides will agree, that this proceeding involves an important question, namely, whether the papers show *prima facie* an extradition case, or whether they show *prima facie* a situation of uncertainty which, under reasonable construction of the constitution and the statutes, makes it a case not within the extradition law. So it may as well be understood that the effort today will be to complete the pleadings so far as possible. I want to give both sides ample opportunity to put the papers in shape, so they will be sure that the questions are raised. Then I shall ask counsel to act under Rule 23 in respect to printing the record, and then I shall order printed briefs, and shall give reasonable time for briefs to be prepared. I do not want to be put in the position of passing upon a case which involves as important a question as I deem the one involved in this to be, without dealing with it under the rule in respect to printing and in respect to briefs.

MR. JEROME. I understand your Honor's views are that after the pleadings are perfected they shall be printed and also the briefs of counsel, and that then those briefs will be sent to you and a day set down for arguments?

THE COURT. Yes.

MR. JEROME. May I ask this, your Honor: I find the practice in different districts of the United States is not uniform, wholly uniform in regard to the way in which the court treats the function of the petition in writs of habeas corpus. As I understand the practice in most of the circuits of the United States, the petition is treated as *functus officio* when the writ issues and the pleadings are made and the traverse or demurrer to the return. There is from the casual glance at the supplemental petition—It is not to be filed by counsel in this case. There are many matters there that would have to be dealt with in the way of answer perhaps, in the return if the petition

was to be taken as, so to speak, the first pleading in the matter. The practice, as I understand it, is that as far as any element of being a pleading goes, the petition is *functus officio;* when the writ issues, the duty devolves upon the respondent to set up simply the cause of detention, and if the relator desires to traverse those, demur to it or allege any new matter in the pleading, the nature of which is simply similar to that of an answer or a declaration at common law. This petition is extremely voluminous, sets up a number of matters, a number of conclusions of law, other matters of raising questions which it is conceived by counsel for the respondent are not to be passed upon in this proceeding, but if we have to treat that in the nature of a pleading, there are certain parts of it to which we would expect to take some action in the nature of a demurrer. There are others to which we would reply; other parts which we would deny. The function of the return to the writ of habeas corpus in almost every circuit court of the United States is simply to return the cause of detention and any matter of a foreign character, any matters that the relator wishes to set up before the court must be set up in the traverse or an answer to that, all the allegations of which are taken upon a final hearing and formally denied for the purpose of being put in issue.

THE COURT. Of course it is not for me to pass upon any question as to the status of the petition after the writ is issued. It may be important and it may not. I would not undertake to say, but Rule 23 requires the entire record to be printed, and whatever court deals with the case subsequently, if the petition is *functus officio*, will deal with it as such, I should suppose. I think the entire record should be printed in this case, and I say also that the rule should operate in respect to briefs.

MR. JEROME. Are your Honor's engagements such that an adjournment may be taken this morning until three o'clock, because by that time I think we can have all of our papers prepared?

THE COURT. I am not insisting at all that the pleadings be perfected today; on the contrary, I think that counsel on both sides should have abundant opportunity to put these pleadings

in such shape as will satisfy them that they are raising all the questions that are involved.

MR. JEROME. May I have your Honor's permission to ask Mr. Morris a question: You could make those changes contemplated in your petition by three o'clock, could you not?

MR. MORRIS. Yes.

I do not know whether there is any misunderstanding about the practice or not. One of my associates inquired of me whether it was expected that we would file an entirely new petition or whether our petition would be treated as an amendment to the old proceeding. I understand from the practice that it was to be filed and treated as a part of the original proceeding.

MR. JEROME. That was my understanding.

THE COURT. Mr. Jerome might come in this afternoon and make his motion, and that could be ruled upon; and then acting upon the suggestion at Littleton he might amend the return of the sheriff by setting up the new authority which he desires to assert.

MR. JEROME. Yes sir.

THE COURT. Then you amend your petition to meet that?

MR. MORRIS. Yes.

THE COURT. You may call it supplemental amendment or supplemental by way of amendment, whichever you please. Then what would be the further pleading?

MR. JEROME. Then I must make—I suppose that we can stand on those as they are, can we not?

THE COURT. There may be a replication, I believe. I do not know what the pleadings are. Of course I am not in a situation to suggest, because I do not know what your papers are.

MR. JEROME. I think if your Honor had seen the papers—The supplemental petition which he has prepared is practically an indication of the points of law that he desires to raise and practically a history of the case as it appears to him from the time of the granting of the first writ. I think that is substantially correct. If he would file that now, there would be nothing for me to do but let it be deemed as a part.

THE COURT. Have you seen it?

MR. JEROME. I have seen what purports to be a copy of it. Then this afternoon I could simply file an amended return. We would then take the writ issued upon the petition which has been amended by the filing of this supplemental petition and the return amended by the return which I shall file this afternoon.

THE COURT. I cannot quite see how the amendment can cover an answer which you have not yet made.

MR. JEROME. But because, sir, that was the condition precedent upon which I thought we had agreed,—that the sheriff by consent of the court should formally place Thaw under arrest, and that he should be continued in the joint custody of the sheriff and of the federal authority. As soon as that was done, Mr. Morris would file his supplemental or amended petition which would set forth that many other changes had taken place since the issuance of the original writ.

THE COURT. I do not understand there is any joint custody. Your suggestion was that the federal authority be suspended to the end that you might take Mr. Thaw into custody under your warrant, and then the custody is to be immediately surrendered to the federal authority. That is what I understood.

MR. JEROME. If he does not, there is still this same difficulty that I found at first. If he be not continued then in the custody of the sheriff of Coös County *qua* sheriff jointly with Marshal Nute, then he cannot be said to be detained under the custody of that warrant, and Mr. Morris cannot truthfully make a petition saying that he is detained by virtue of that warrant, nor can I have Mr. Drew truthfully make a return to this court as to the cause of the detention because he is no longer detained under that. If he executes that and by consent of this court remains in joint custody of this prisoner with the marshal, why there is there no conflict of jurisdiction.

THE COURT. I would hesitate about granting a writ or holding a writ based upon joint authority. The original authority upon which Mr. Thaw was arrested was distinctly state authority, and he is held against that now. Now you have new papers which you want to interpose. I understood your motion to be that this federal authority which holds him against the state arrest be suspended in order that you might—

MR. JEROME. Might serve it.

THE COURT. Might serve it and then be taken again by the federal authority.

MR. JEROME. He could if the court granted a new writ, but if the court orders now the old writ, that he be taken out—I do not want to raise any objection of any kind whatsoever. I want to go ahead before your Honor as soon as possible.

THE COURT. You can readily see that it would be illogical to hold a writ of habeas corpus against joint custody, wouldn't it?

MR. JEROME. Well, it is for that reason that it seems to me the simplest way was the way I originally suggested. My suggestion I yielded out of deference to the wishes of counsel for the other side, and I am willing to yield it now, but the difficulty of swearing in any kind of petition—

THE COURT. If you ask me about the simplest way, I should say it would be this. I do not say it out of any disrespect to the Executive action. You tender your Executive authority here, and I ignore it pending this proceeding, you fix your papers by annexing it, and save your questions by exception. I think this is perfectly simple, and all of this colloquoy with a view of—

MR. JEROME. If that were done, what question would the federal court have before it other than the original detention? None. We do not ask this court to pass on that original detention. We ask leave to withdraw our return. We ask leave to abandon any opposition to it. The difficulty of procedure, I submit, on a writ of habeas corpus, where a man is not in custody under the authority, from whose custody you seek to free him, is insuperable. He must in some way get into that custody before the writ of habeas corpus can be extended.

MR. MORRIS. I do not see any objection to the plan which we have outlined. It seems to me that it is essential that the executive warrant should be served, so that the questions—the determination will be a final determination. If it were not served, it might be troublesome hereafter. Now, then, the prisoner is now in the custody of the federal court. Let that custody be released for a sufficient length of time to serve the

executive warrant; then the amended petition is filed, and without further ado about it, he then—I do not know whether they would insist—I do not think they would insist upon any formal service of a new writ of habeas corpus—would be taken out of the possession, as he would on the original habeas corpus writ, and put into the possession of the United States.

MR. JEROME. Let Mr. Morris have his petition ready this afternoon; let me have my return this afternoon. When we come back, will your Honor say that we permit the sheriff of Coös County to take this prisoner into his custody. Let the sheriff take him into his custody. Let Mr. Morris file his petition. Let me at once file and your Honor direct that the extant writ shall be broadened to cover the custody mentioned by Mr. Morris in his petition. I file at once my return, and your Honor directs the pending decision on the writ broadened by that order. The prisoner shall be returned to the custody of the United States marshal and Holman Drew as keepers of this court.

MR. STONE. That would raise one additional question; that is, whether the court had released its jurisdiction of the prisoner by making any order of that kind. It is not necessary to wait until the prisoner gets out of jail before you can serve a warrant on him. They may serve a warrant on him to take effect when he gets out of the custody of this court, if he ever does. We would be willing to do anything to make this position more plain, but I do not like to have this court release its jurisdiction which it obtained before the governor took jurisdiction or before the agent of New York takes it by virtue of the governor's warrant. It would put this court in an awkward position by deciding formally in making a record of releasing its jurisdiction and discharging the writ; then the court might find itself desirous of retaining the writ and discharging the petitioner. I do not see why we should mix up our record so as to make it awkward. The court has jurisdiction. It obtained jurisdiction before the governor's warrant, and it will not let up or release that jurisdiction to accommodate any pleading. Now he may serve his warrant and then file—Your Honor had it exactly right in your suggestion, then file his return to the

writ of habeas corpus that was issued on your Honor's order weeks ago. Then we come in afterwards and file our amended petition. The hearing is on whether he shall be released from the warrant which the governor has recently issued.

MR. JEROME. The trouble with that is, in the first place, it is fundamentally an unsound proposition of law, as by continuing the custody in which the relator is, by continuing the custody pending the decision on the writ of habeas corpus, the court loses jurisdiction. The court has absolute jurisdiction pending the decision to put that man, the relator, on a writ of habeas corpus into any custody which the court seems wise.

The second proposition of the executive does not help us a bit. It is entirely at variance with what Mr. Morris and I agreed about it, because it puts us back again after service where your Honor will have no jurisdiction to pass upon the validity of this proposition at all, because we cannot make a truthful return under the circumstances that the man is in custody under the warrant of the state of New Hampshire. The procedure suggested by Mr. Morris, as I understood him, if we came back this afternoon, he with his prepared amended petition, I with a proper return to it, that then by the permission of this court, the sheriff of Coös County would take into his custody under the warrant of the State of New Hampshire the body of Harry K. Thaw. Mr. Morris' petition would set forth the circumstance that he had been arrested by the sheriff of Coös County and would be filed. The court would say, is it necessary that we should issue a net writ on these papers or should the old writ be broadened so as to cover it. Counsel on both sides say, we stipulate and consent that the old writ shall be broadened to cover the new imprisonment rather than put the court and counsel to the bother and annoyance of having a new writ issued. The court would then say, so ordered, and then Sheriff Drew would through me file a return immediately, and the court would say this writ being broadened to cover this situation, I take this prisoner pending the decision on this writ from the custody of the sheriff of Coös County and place him again anew in the custody of Marshal Nute and the sheriff

of Coös County as keepers of this court, pending a decision. Now there is no lapse of jurisdiction anywhere that I can see.

MR. STONE. The trouble all comes because learned counsel did not file his return to the original writ of habeas corpus as was suggested by your Honor. He has not filed it yet.

MR. JEROME. Oh, yes, I have filed the return. Counsel is mistaken.

THE COURT. I see no objection to New York's coming in and saying they now seek to hold the petitioner under the warrant of the governor, and amending that way, but if Mr. Jerome wants to do it the other way, I see no objection to that, but I think he should put his motion in writing, stating what he asks to have done and embody also the steps which he proposes to take after it is done, so there shall be no slip about it.

MR. CHASE. (William M.) May I make a suggestion to your Honor: That is, Mr. Jerome should put his motion in writing as to what he desires, and submit it to us during the intermission, and we will confer together, see how it impresses us, and if it seems to be reasonable,—I do not think there is any disposition on the part of the relator here to have anything done that is not above-board and all right,—perhaps we can come to an agreement about it, if Mr. Jerome will put his motion in writing just what he wants, and then we will consider it. If adjournment should be had until three o'clock this afternoon, we should have an opportunity to confer about it.

MR. JEROME. I think, Judge Chase, that we could get together and prepare such a motion which both of us would consent to. I am trying to meet you gentlemen in this matter. My motion was to sustain this writ and discharge the prisoner, a motion which if we can agree on a joint motion I will withdraw.

MR. CHASE. I am not prepared to say we shall object to your motion.

MR. JEROME. I think, sir, it should be a joint motion.

MR. CHASE. We should not join you.

MR. JEROME. There we are. I shall have to stand on my original statement.

THE COURT. I am very glad to see that it is the purpose of both sides to perfect this record so that the questions will be

raised in a comprehensive way. I have no doubt that it can be done.

Do you suggest three o'clock?

MR. JEROME. It is a matter of indifference to me. I have been told we cannot agree on anything.

THE COURT. We will take a recess and come in at three o'clock.

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3 P.M., Nov. 18, 1913.

MR. JEROME. I desire to file a motion which, with your Honor's permission, I will read:

DISTRICT COURT OF THE UNITED STATES
OF AMERICA
DISTRICT OF NEW HAMPSHIRE.

UNITED STATES OF AMERICA
ON THE RELATION OF HARRY K. THAW

v.

HOLMAN DREW, SHERIFF OF COÖS COUNTY,
NEW HAMPSHIRE.

Now comes the respondent in the above entitled matter and respectfully moves this court as follows:—

First. That this honorable court permit the respondent above named as sheriff of Coös County, New Hampshire, t serve and execute upon the above named relator a certain wa rant in extradition proceedings issued by the governor of Ne Hampshire now in this respondent's hands for execution an service; and that this respondent be permitted by virtue of sai warrant to take into his sole custody under said warrant th body of said relator.

Second. That upon such service and execution of said war rant the relator herein have permission of this court, if he sha be so advised, to file forthwith any papers in the nature of a amendment to the petition herein or supplementary thereto.

Third. That thereafter and forthwith this court order an direct that the writ of habeas heretofore herein issued sha

be taken and deemed so broadened in its scope as to require a return thereto which shall include the cause of detention which shall then exist under and by virtue of the said warrant of the governor of New Hampshire.

Fourth. That thereupon and pending such return and decision thereon the relator shall by order of this court be committed to the custody of E. P. Nute and Holman Drew as keepers under the control and jurisdiction of this court.

Fifth. That the respondent herein shall thereafter have seven days within which to file with the clerk of this court his return to the writ of habeas corpus herein broadened in its scope as above described.

There were two other sections in here which, with your permission, I will withdraw, as they refer to printing briefs and papers and to setting a date down for hearing which will, I take it, be done at such time as may suit the convenience of this court and counsel.

THE COURT. Your paragraph reads "E. R. Nute"; it should be E. P. Nute.

MR. JEROME. E. P. Nute; yes sir.

MR. MORRIS. May it please the Court: Counsel for Mr. Thaw are content to submit the matter for consideration of the court without further argument.

THE COURT. I have considered the motion; and you may enter these orders, Mr. Clerk:

* * * * *

ALDRICH, J.

Upon consent of all parties, the petitioner is released from custody of present keepers now holding him under Federal authority. Writ of September 13, 1913, and proceedings under it temporarily suspended, to the end that the petitioner may be taken into custody under the state extradition warrant, the foregoing release and suspension being upon the understanding that the petitioner is not be removed beyond state lines under the extradition warrant.

Petitioner has leave to file application for supplemental writ. Supplemental writ to issue and petitioner to be returned there-

under to federal custody. Sheriff Drew to answer supplemental writ within seven days or earlier at his option. Petitioner to have five days in which to reply to the respondent's answer.

All the foregoing orders are made upon consent of parties, and the respondent reserves his right to stand hereafter upon the extradition warrant alone if he may, and the petitioner reserves his right to stand under both writs if he may.

It is understood that under the above orders made upon consent no party waives rights in respect to any substantial question.

* * * * *

THE COURT. Now as to printing, you are to have, in the first place, seven days after these preliminary things are done in which to answer; then the petitioner has five days in which to reply, if he desires to reply. These papers I think under the rules should all be filed with the clerk, and they will be, of course, and under the practice in this circuit the clerk takes charge of the printing and will advance it speedily, and when the printed record is put in my hands I will confer with counsel and make orders with respect to briefs. Is that satisfactory?

MR. JEROME. Entirely so.

MR. MORRIS. Yes.

HOLMAN DREW (Sheriff of Coös County, N. H.). Harry K. Thaw, I place you under arrest upon this extradition warrant issued to me by Governor Samuel D. Felker.

Mr. MORRIS. We ask leave to file at once the supplemental petition.

THE COURT. Leave is granted and I think you better go through the formality of having another supplemental writ.

MR. MORRIS. I didn't understand.

THE COURT. Instead of broadening as has been suggested, I think you better go through the formality of taking another supplemental writ and let Mr. Nute make his return. Then when that is done—and I suppose it may as well be treated as done—we will consider the matter as to future custody, some future time, some convenient time.

MR. MORRIS. We will be ready to file our petition at once.

The writ can issue, and he can be ordered back into the custody of the sheriff.

MR. JEROME. The marshal serves the writ and pending the return, if your Honor directs, he may be taken into the same custody as before.

THE COURT. That will be satisfactory to you?

MR. JEROME. Entirely, sir.

THE COURT. And to you, Mr. Morris?

MR. MORRIS. Yes sir.

MR. JEROME. I take it, sir, that the papers that the clerk will print will be—I ask this for information that I may be in a position from time to time to do such work on the preparation of the return and brief as possible—the papers heretofore filed therein, this new supplemental petition and return thereto and such reply, if any, as may be made.

THE COURT. Yes; all that any way and possibly more. Of course I do not recall them all. The idea is to make the record complete from the time Mr. Nute arrived at Colebrook down through to the present time.

MR. MORRIS. One motion that we would like to make, your Honor: Inasmuch as the petition which is filed is practically the same petition that was filed yesterday, with a few dates changed, I would ask leave to withdraw the petition filed yesterday, so it might not have to be printed in the record.

THE COURT. You may do that. You better call Mr. Jerome's attention to the changes, if there are any.

MR. JEROME. If you will.

MR. MORRIS. We will correct his copy to conform to the filed copy.

THE COURT. I do not suppose we need wait for these formalities.

MR. JEROME. I suppose those will be very well done, sir, without further direction from the court. They will involve service upon the writ, service of Marshal Nute on Sheriff Drew. Sheriff Drew will have the custody of Thaw with Marshal Nute as keepers.

MOTION OF RESPONDENT AND STATE OF NEW YORK.

[Filed November 18, 1913.]

Now comes the respondent in the above entitled matter and respectfully moves this Court as follows:

First. That this honorable court permit the respondent above named as Sheriff of Coös County, New Hampshire, to serve and execute upon the above named relator a certain warrant in extradition proceedings issued by the Governor of New Hampshire now in this respondent's hands for execution and service; and that this respondent be permitted by virtue of said warrant to take into his sole custody under said warrant the body of said relator.

Second. That upon such service and execution of said warrant the relator herein have permission of this Court, if he shall be so advised, to file forthwith any papers in the nature of an amendment to the petition herein or supplementary thereto.

Third. That thereafter and forthwith this Court order and direct that the writ of habeas heretofore herein issued shall be taken and deemed so broadened in its scope as to require a return thereto which shall include the cause of detention which shall then exist under and by virtue of the said warrant of the Governor of New Hampshire.

Fourth. That thereupon and pending such return and decision thereon the relator shall by order of this Court be committed to the custody of E. P. Nute and Holman Drew as keepers under the control and jurisdiction of this Court.

Fifth. That the respondent herein shall thereafter have seven days within which to file with the clerk of this Court his return to the writ of habeas corpus herein broadened in its scope as above provided.

Respectfully submitted,

WM. TRAVERS JEROME,
BERNARD JACOBS,
FRANKLIN KENNEDY,
Counsel for the respondent and the State of New York.

CONCORD, N. H., November 18, 1913.

ORDER OF COURT.

[November 18, 1913.]

ALDRICH, J.

Upon consent of all parties, the petitioner is released from custody of present keepers now holding him under Federal authority. Writ of September 13, 1913, and proceedings under it temporarily suspended to the end that the petitioner may be taken into custody under the State extradition warrant,—the foregoing release and suspension being upon the understanding that the petitioner is not to be removed beyond State lines under the extradition warrant.

Petitioner has leave to file application for supplemental writ.

Supplemental writ to issue and petitioner to be returned thereunder to Federal custody.

Sheriff Drew to answer supplemental writ within seven days, or earlier, at his option.

Petitioner to have five days in which to reply to the respondent's answer.

All the foregoing orders are made upon consent of parties, and the respondent reserves his right to stand hereafter upon the extradition warrant alone, if he may, and the petitioner reserves his right to stand under both writs, if he may.

It is understood that under the above orders, made upon consent, no party waives rights in respect to any substantial

RETURN ON WARRANT OF EXTRADITION

MERRIMACK COUNTY ss.

November 18th, 1913.

The within named HARRY K. THAW having been released from the custody of the United States District Court for the District of New Hampshire, I forthwith arrested him under the within warrant of extradition and the said Thaw was immediately taken from my custody under a writ of *habeas corpus* served by Eugene P. Nute, United States Marshal for said District of New Hampshire.

HOLMAN A DREW,
Sheriff of Coös County.

MOTION OF RESPONDENT AND STATE OF NEW YORK.

[Filed November 18, 1913.]

Now comes the respondent in the above entitled matter and respectfully moves this Court as follows:

First. That this honorable court permit the respondent above named as Sheriff of Coös County, New Hampshire, to serve and execute upon the above named relator a certain warrant in extradition proceedings issued by the Governor of New Hampshire now in this respondent's hands for execution and service; and that this respondent be permitted by virtue of said warrant to take into his sole custody under said warrant the body of said relator.

Second. That upon such service and execution of said warrant the relator herein have permission of this Court, if he shall be so advised, to file forthwith any papers in the nature of an amendment to the petition herein or supplementary thereto.

Third. That thereafter and forthwith this Court order and direct that the writ of habeas heretofore herein issued shall be taken and deemed so broadened in its scope as to require a return thereto which shall include the cause of detention which shall then exist under and by virtue of the said warrant of the Governor of New Hampshire.

Fourth. That thereupon and pending such return and deci-

ORDER OF COURT.

[November 18, 1913.]

ALDRICH, J.

Upon consent of all parties, the petitioner is released from custody of present keepers now holding him under Federal authority. Writ of September 13, 1913, and proceedings under it temporarily suspended to the end that the petitioner may be taken into custody under the State extradition warrant,—the foregoing release and suspension being upon the understanding that the petitioner is not to be removed beyond State lines under the extradition warrant.

Petitioner has leave to file application for supplemental writ.

Supplemental writ to issue and petitioner to be returned thereunder to Federal custody.

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Petitioner to have five days in which to reply to the respondent's answer.

All the foregoing orders are made upon consent of parties, and the respondent reserves his right to stand hereafter upon the extradition warrant alone, if he may, and the petitioner reserves his right to stand under both writs, if he may.

It is understood that under the above orders, made upon consent, no party waives rights in respect to any substantial question.

SUPPLEMENTAL PETITION FOR A WRIT OF HABEAS CORPUS.

[Filed November 18, 1913.]

To the

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW HAMPSHIRE:

HENRY KENDALL THAW, of Pittsburgh, County of Allegheny, and State of Pennsylvania, respectfully represents:

1. That he is a citizen of the State of Pennsylvania, in the United States.

2. That on the 1st day of February, 1908, your petitioner was acquitted by a jury in the County of New York, State of New York, on an indictment charging him with homicide committed on the 26th day of June, 1906. That the verdict of the jury rendered, stated that your petitioner was acquitted on the ground of insanity at the time of the act. That Section 454 of the Code of Criminal Procedure of the State of New York, as published in Parker's New York Criminal and Penal Code, Annotated, 1908, on page 139, provides as follows:

> "When the defense is insanity of the defendant the jury must be instructed, if they acquit him on that ground, to state the fact with their verdict. The court must, thereupon, if the defendant be in custody, and they deem his discharge dangerous to the public peace or safety, order him to be committed to the state lunatic asylum, until he becomes sane."

3. Justice Victor J. Dowling, presiding over the trial of your petitioner, on February 1st, 1908, charged with homicide, made the following order:

> "The defendant on his trial in said indictment having been acquitted by the jury on the ground of insanity, and the court being certified of the fact, and the defendant being in custody, and the court deeming his discharge at this time dangerous to public safety, it is
>
> ORDERED that said Harry K. Thaw BE DETAINED IN SAFE CUSTODY AND BE SENT TO THE MATTEAWAN STATE HOSPITAL there to be kept in said hospital until thence discharged by due course of law.
>
> IT IS FURTHER ORDERED that the Sheriff of the County of New York do forthwith convey said Harry K. Thaw to said hospital."

That said order, in so far as it requires that said Thaw shall be kept in the Matteawan State Hospital until thence discharged by due course of law, was unauthorized and illegal.

4. That no trial or inquiry was had by a judge, jury or committee of inquiry to determine whether at the time said Justice Dowling made such order, your petitioner was insane or unsafe to be at large.

5. That on said 1st day of February, 1908, your petitioner was conveyed to the Matteawan State Hospital in Dutchess County, State of New York, where he was confined as an insane inmate until the 4th day of May, 1908, when he was conducted to the County Jail in Poughkeepsie, Dutchess County, State of New York, and there confined pending a hearing before Justice Joseph Morschauser, on a petition for a writ of *habeas corpus* for discharge from Matteawan, on the ground that he had become and was sane; and at said hearing Justice Morschauser refused to discharge your petitioner, deciding that he had not become sane and was not sane.

That your petitioner was returned to the Matteawan State Hospital, where he remained as an insane inmate of said Hospital until about June, 1909, when he was taken to White Plains, Westchester County, State of New York, and confined in the County Jail, and there kept during another hearing on a petition for a writ of *habeas corpus* before Justice Mills of the Supreme Court of the State of New York; when, after a hearing, said Justice Mills refused to discharge your petitioner and decided that he had not become sane and was not sane. He was returned again to Matteawan State Hospital and there kept as an insane inmate until about June, 1912, when he was again taken to White Plains, Westchester County, State of New York, and confined in the County Jail there, pending a hearing before Justice Martin J. Keogh, of the Supreme Court of New York, when a third inquiry was had, resulting in a decision by Justice Keogh that your petitioner had not become sane and was not sane, after which he was returned to the Matteawan State Hospital and there kept as an insane inmate until the 17th day of August, 1913.

6. That on said 17th day of August, 1913, your petitioner escaped from the said Matteawan State Hospital. That on the 19th day of August, he was arrested at the little town of Barford, in the Dominion of Canada, and committed to the prison at Sherbrooke, Dominion of Canada. That he was finally, under orders of the Department of Immigration of the Dominion of Canada, taken across the Canadian line into the State of Vermont on the 10th day of September, 1913. That

on the said 10th day of September, 1913, your petitioner was arrested at Colebrook, in the State of New Hampshire, under advice from the authorities of the State of New York, pending a requisition by the Governor of New York upon the Governor of New Hampshire for his return to New York State.

7. That on the 12th day of September, 1913, the Acting Governor of the State of New York made a requisition upon the Governor of the State of New Hampshire for the return of your petitioner to the State of New York to answer a charge of conspiracy in Dutchess County to commit an act for the perversion or obstruction of justice, or of the due administration of the laws, in conspiring, with others, to escape from the said Matteawan State Hospital. That said charge was submitted to the grand jury of Dutchess County, New York, and considered by such grand jury on, to wit, the 19th day of September, 1913; that said grand jury acted on said charge and failed to indict the said Harry K. Thaw.

8. That on the 13th day of September, your petitioner presented his petition to your Honor asking for a writ of *habeas corpus*, alleging, among other things, that he was illegally restrained of his liberty by the Sheriff of Coös County, State of New Hampshire. That on the return of said writ of *habeas corpus*, your Honor did direct that the proceedings be suspended until the requisition then pending before the Governor of the State of New Hampshire should be disposed of and that an application could be made in the future, with notice to the other side, to renew the proceedings pending on said writ of *habeas corpus* issued by and at the direction of your Honor.

9. That on the 24th day of October, 1913, the Governor of the State of New York made an additional requisition upon the Governor of the State of New Hampshire, for the extradition of your petitioner, which requisition set forth that your petitioner had been indicted by a grand jury in the County of New York on the 23d day of October, 1913, the requisition charging the commission of the same offense in Dutchess County that had been charged against him in the former requisition.

10. That on the 6th day of November, 1913, a third requisition was made by the Governor of New York State upon the

Governor of the State of New Hampshire, for the extradition of your petitioner, charging the same offense that had been previously charged but alleging it to have been committed in the County of New York. That the said extradition papers are based upon an indictment found under Section 168 of Parker's New York Criminal & Penal Code, Annotated 1908, at page 68, which is as follows:

> "If two or more persons conspire either . . . to commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice, or of the due administration of the laws; each of them is guilty of a misdemeanor."

11. That on the 8th day of November, 1913, the Governor of the State of New Hampshire issued a Warrant directing the extradition of your petitioner to the State of New York and the delivery of your petitioner to FRED C. HORNBECK, agent, for extradition to the State of New York, and that your petitioner has been arrested by Holman A. Drew, Sheriff of Coös County under said warrant.

12. That your petitioner herewith renews his petition to be discharged under the writ of *habeas corpus* pending before your Honor, and requests that the writ may be enlarged.

13. That your petitioner alleges that he is unjustly detained of his liberty by the said HOLMAN A. DREW, for the following reasons:—

FIRST: Section 454 of the Code of Criminal Procedure of the State of New York, which provides that:

> "When the defense is insanity of the defendant the jury must be instructed, if they acquit him on that ground, to state the fact with their verdict. The court must, thereupon, if the defendant be in custody, and they deem his discharge dangerous to the public peace or safety, order him to be committed to the state lunatic asylum, until he becomes sane."

is in conflict with the Sixth and Fourteenth Amendments to the Constitution of the United States, and is unconstitutional, and that said order of Justice Victor J. Dowling is null and void.

SECOND: In neither of the three requisitions, or in the petitions to the Governor of the State of New York, or the information of the District Attorney of Dutchess County, or the information of the Attorney General of the State of New York, or the indictment found in the County of New York, is there a crime charged, as required by the Constitution of the United States and by Section 5278 of the Revised Statutes of the United States.

THIRD: The requisition in its petition, affidavit and indictment, charges that a lunatic confined in an insane asylum conspired with others to escape. To escape from a lunatic asylum is neither a crime or a misdemeanor under the common law or statute in the State of New York; nor is the conspiring of a lunatic confined in a lunatic asylum, with others, to escape from a lunatic asylum a crime or misdemeanor under the common law or statute law of the State of New York.

FOURTH: Conspiring to escape from a lunatic asylum in the State of New York is not conspiring to pervert or obstruct justice, or the due administration of justice, under the laws of the State of New York.

FIFTH: According to the papers filed with all three requisitions, it is alleged, in effect, that your petitioner was, at the time of committing the conspiracy alleged, an insane person. If these allegations are true, the alleged acts of the petitioner which are relied upon to constitute the crime alleged, presumptively being the product of an insane mind, would not be of a criminal nature and would not constitute conspiracy.

SIXTH: If your petitioner had become sane within the short period elapsing between the decision of Justice Keogh and his escape, he had a right to escape under the law empowering Justice Dowling to send him to Matteawan, and he had a right to conspire to escape, if he was sane.

Good faith is presumed in the demanding state, unless the contrary appears.

Your petitioner alleges that the requisition papers in the three requisitions, the failure of the grand jury to indict in Dutchess County, the indictment in New York County by the grand jury before whom the Special Deputy Attorney General

appeared as a witness while prosecuting this request, the failure to deport your petitioner to his home state, the State of Pennsylvania, under the law of the State of New York requiring such deportation, the repeated declarations of the representatives of the State of New York that they were going to get possession of the body of your petitioner to re-confine him in Matteawan State Hospital, and the atmosphere of the proceedings on the part of the Special Deputy Attorney General of the State of New York prosecuting this requisition, all establish bad faith, and are convincing evidence of the purpose to obtain possession of your petitioner, not for trial on an indictment for conspiracy in the County of New York, but for re-confinement in the Matteawan State Hospital. Good faith cannot be presumed where the evidence rebuts it.

Therefore, your petitioner asserts he is unlawfully detained of his liberty within the District of New Hampshire, in violation of the Sixth and Fourteenth Amendments of the Constitution of the United States and contrary to the provisions of Section 5278 of the Revised Statutes of the United States, and he most respectfully prays that he may be discharged.

Your petitioner hereto attaches certified copies of the three requisition papers from the Governor of New York to the Governor of New Hampshire; also copy of the reasons given by Governor Felker for granting the requisition, together with the Opinion of the Attorney General of New Hampshire; also a copy of the Warrant of Extradition, and makes them a part of this petition.

Respectfully submitted,

HENRY KENDALL THAW,

Petitioner.

STATE OF NEW HAMPSHIRE
COUNTY OF MERRIMACK
CITY OF CONCORD. } ss:

On this 18th day of November, in the year of our Lord Nineteen Hundred and Thirteen, personally appeared before me, a Justice of the Peace in and for the said County and State aforesaid, duly authorized to administer oaths, HENRY KENDALL

THAW, who, being by me duly sworn according to law, doth depose and say, that the above and foregoing facts stated in his said petition are true to the best of his knowledge and belief.

MERRILL SHURTLEFF,
Justice of the Peace.

Subscribed and sworn to before me this 18th day of November, 1913.

MERRILL SHURTLEFF,
Justice of the Peace.

(Certificate of Edward N. Pearson, Secretary of State.)

STATE OF NEW HAMPSHIRE.

DEPARTMENT OF STATE

[SEAL]

To all to whom these Presents Shall Come, GREETING:

I, EDWARD N. PEARSON, Secretary of State of the State of New Hampshire, do hereby certify that the following and hereto attached is—are true copies, constituting the application of the Acting Governor of the State of New York for the extradition of Harry K. Thaw, which have been filed in the office of the Secretary of State, and are true copies of the only papers and of all the papers relating to said application which have been filed.

IN TESTIMONY WHEREOF, I hereto set my hand and cause to be affixed the Seal of the State, at Concord, this 15th day of September—A. D. 1913. [SEAL]

(Signed) EDWARD N. PEARSON,
Secretary of State.

(*Requisition Papers of September 12, 1913.*)

[State Seal]

STATE OF NEW YORK

EXECUTIVE CHAMBER.

The Governor of the State of New York,
to the Governor of The State of New Hampshire.

WHEREAS, it appears by certain documents and other papers which are hereto annexed, and which I hereby certify to be authentic and duly authenticated in accordance with the laws of this State, that Harry K. Thaw stands charged with the crime of Conspiracy which I certify to be a crime under the laws of this State, committed in the County of Dutchess, in this State; and it having been represented to me that he has fled from the justice of this State, and has taken refuge within the State of New Hampshire

NOW, THEREFORE, pursuant to the provisions of the Constitution and the laws of the United States in such case made and provided, I DO HEREBY REQUEST that said Harry K. Thaw be delivered up to Fred C. Hornbeck who is duly authorized to receive him and convey him to the State of New York, there to be dealt with according to law.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of New York to be affixed this 12th day of September in the year of our Lord one thousand nine hundred and thirteen.

[GREAT SEAL]

MARTIN H. GLYNN,
Lieutenant Governor, Acting Governor.

CARL VOEGEL,
Deputy Secretary of State.

(*Certificate of Edward A. Conger, District Attorney.*)

OFFICE OF THE DISTRICT ATTORNEY,

COUNTY OF DUTCHESS, STATE OF NEW YORK,

POUGHKEEPSIE, N. Y., September 11, 1913.

In the Matter of the Application
for requisition for the return
of
HARRY K. THAW,
a fugitive from justice.

To

His Excellency, Martin H. Glynn, Acting Governor of the State of New York.

I, Edward A. Conger, District Attorney of the County of Dutchess and State of New York, do make the following certificate:

The full name of the person for whom requisition is asked is, HARRY K. THAW.

The name of the person proposed is FRED C. HORNBECK.

In my opinion the ends of justice require that Harry K. Thaw be brought to the State of New York for trial at the public expense and I am willing that such expense be a County Charge upon the County of Dutchess.

That I believe that I have sufficient evidence to secure the conviction of the said Harry K. Thaw of the crime of Conspiracy.

That the person named as Agent, FRED C. HORNBECK, is a proper person, a public officer, to wit:— the Sheriff of the County of Dutchess, New York and has no interest in the arrest of the fugitive.

No former application for a requisition for the same person growing out of the same transaction has been made and no application has ever been made for a requisition for the said Harry K. Thaw.

The said Harry K. Thaw is now under criminal arrest and is now in the custody of Holman A. Drew, Sheriff of Coös County, New Hampshire, who is holding the said Harry K. Thaw pending the arrival of requisition papers.

That the application is not made for the purpose of enforcing the collection of a debt or for any private purpose and that if the requisition is granted, the criminal proceedings shall not be used for any of said purposes.

The several sets of papers have been compared and are in all respects exact counterparts.

That the offense charged is a Misdemeanor, to wit:—the crime of Conspiracy, in which, under Section 580 of the Penal Law of the State of New York, is defined as follows:*

> "If two or more persons conspire
> 1. To commit a crime, or
> . . . . . .
> 6. To commit any act . . . . for the perversion or obstruction of justice or of the due administration of the laws, each of them is guilty of a misdemeanor." That said offense is punishable by imprisonment in a penitentiary or County Jail for not more than one year or by a fine of not more than Five Hundred Dollars ($500) or by both. (Sec. 1937 of the Penal Law of the State of New York.)

No indictment has been found against the said Harry K. Thaw for the commission of the said crime for the reason that from the date of the said crime until September 8th, there was no session of the Grand Jury. That for the past three days there has been a Grand Jury in session in the County of Dutchess, but the said Grand Jury will be unable to hear the said case for some time and will not make a report of its findings for at least two weeks.

Hereto annexed are affidavits taken before the magistrate in support of the information. Said affidavits are of facts and circumstances, showing the commission of the crime charged and that the accused person perpetrated the same.

Hereto annexed are copies of the information laid before the magistrate and which information was made by the petitioner

herein and hereto annexed is a copy of the warrant issued for the arrest of the said Harry K. Thaw.

Hereto annexed is the affidavit of Fred C. Hornbeck, that he is a peace officer, to wit:—the Sheriff of the County of Dutchess and that a warrant for the arrest of the fugitive was placed in his hands, certified copies of the warrant being hereto annexed. That no return has been made to the said warrant.

Hereto annexed is proof by affidavits of Raymond F. C. Kieb and Fred C. Hornbeck, showing the age as near as may be and the occupation of the accused; that he was within this State at the time of the commission of the crime and has since departed therefrom and is within the State of New Hampshire, on whose Executive this requisition is to be made and that the said Harry K. Thaw was confined in the Matteawan State Hospital for the criminal insane at the City of Beacon in the County of Dutchess and State of New York and departed from this, the State of New York, on or about the seventeenth day of August, 1913.

I certify that Fred C. Hornbeck, Raymond F. C. Kieb and James A. Parsons and John E. Mack, whose affidavits are hereto annexed, are each respectable persons entitled to credit. This application is based upon the papers above mentioned and hereto annexed and in my opinion is a proper case for requisition.

All of which is respectfully submitted with the request that requisition be made upon the Governor of the State of New Hampshire for the return of the said fugitive from justice.

HARRY K. THAW.

Dated at the City of Poughkeepsie, this 11th day of Sept., 1913.

(Signed) EDWARD A. CONGER,
District Attorney of Dutchess County.

(Information)

STATE OF NEW YORK }
COUNTY OF DUTCHESS } ss—

I, Edward A. Conger, District Attorney of the County of Dutchess, now appear before Joseph Morschauser, Justice of

the Supreme Court of the State of New York and give information under oath as follows:—

That one Harry K. Thaw, Richard J. Butler, a man about six feet tall, fairly light complexion, smooth shaven and weighing about 185 or 190 pounds and having a large nose, and Roger Thompson, a man about 6 feet tall and weighing about 160 or 165 pounds, clean shaven and square shoulders and well built and wearing a blue suit, fair complexion; Michael O'Keefe, Eugene Duffy, Howard H. Barnum and Thomas Flood, at the City of Beacon, County of Dutchess and State of New York, did wilfully, knowingly, corruptly and falsely commit the crime of Conspiracy against the People of the State of New York, by conspiring among themselves to commit acts for the perversion and obstruction of justice and the due administration of the Laws and to commit a crime by conspiring and arranging and planning to effect and produce the escape of one Harry K. Thaw, a prisoner duly committed to and confined in the Matteawan State Hospital, a criminal insane hospital of the State of New York and by arranging, procuring, planning and carrying out the escape of the said Harry K. Thaw, whereby on the 17th day of August, 1913, said Harry K. Thaw, with the aid and assistance of the said above-named parties and defendants, did escape from the Matteawan State Hospital for the criminal insane, at the City of Beacon.

WHEREFORE deponent prays that the depositions of William Gordon, Lindley Churchwell, Robert Lowery, Annie Maher, James F. Maher, Leroy G. Crum, William Flannigan, Raymond F. C. Kieb and Thomas Malloy, may be taken and that a warrant issue for the arrest of the above named defendants as provided by law.

(Signed) EDWARD A. CONGER.

Sworn to before me this
11th day of September, 1913.
(Signed)
JOSEPH MORSCHAUSER
Supreme Court Judge.

(*Affidavit of Raymond F. C. Kieb*)

STATE OF NEW YORK }
COUNTY OF DUTCHESS } ss:

RAYMOND F. C. KIEB being duly sworn deposes and says:—I am the regularly appointed and acting Medical Superintendent of Matteawan State Hospital, a Hospital for the criminal insane, and I have been such Medical Superintendent from the sixth day of June, 1913. One Harry K. Thaw was confined in said Matteawan State Hospital and has been confined there since February 1, 1908. Annexed hereto and made a part of this affidavit is a copy of the Order committing the said Harry K. Thaw to the Matteawan State Hospital. At the time the said Harry K. Thaw was committed to the said Matteawan State Hospital, I was one of the assistant physicians at the said Hospital and was present at the time the said Thaw was admitted to the said institution. I met him at the institution and received him from the officers from New York City and entered his name upon the records at the institution. The said Harry K. Thaw has never been discharged from the said institution and has been an inmate thereof from the date of his admission until the seventeenth day of August, 1913, at which last date he escaped. The said Harry K. Thaw was in the Matteawan State Hospital, confined as an inmate, to my own knowledge, up to the said seventeenth day of August, 1913. The crime, the commission of which he is now accused of is that of Conspiracy, in conspiring with Richard J. Butler and others to effect his (Thaw's) escape from the said Matteawan State Hospital and at the time of the commission of the said crime he was in the State of New York, at the city of Beacon. Thaw left the said institution about 7.45 in the morning of August 17, having escaped through the rear gate of the said institution and jumped into an automobile which was then and there waiting for him, and disappeared. I was unable to obtain any knowledge of him until about Wednesday, at which time I was informed that he had been arrested at Coaticook, Canada, and charged there with having escaped from the said Matteawan State Hospital. Upon my order he was held and was later sent to Sherbrooke, Canada

and there held in custody. On or about the 25th of August, 1913, I went to Canada and on the 27th day of August, 1913, I saw the said Harry K. Thaw in the Court room at Sherbrooke, Canada, he being then in custody, charged with having escaped from the said Matteawan State Hospital and at the time I saw him he was then remanded by the Justice holding the said Court, to the Sherbrooke Jail to await the action on the said charge. At that time I was informed that the Emigration authorities of Canada were waiting until Harry K. Thaw should be discharged from the Sherbrooke Jail, to arrest him for having entered the country by stealth, at which time proceedings were to be commenced to deport him from the Dominion of Canada upon the ground above stated and upon the further ground that he is an insane person and had been in an institution for the insane within five years. Harry K. Thaw is about 43 years of age and, as far as your deponent knew, had no occupation. Your deponent says that the said Harry K. Thaw was within the State of New York at the time of the commission of the crime for which requisition is asked and departed from this state on or about the seventeenth day of August, 1913. Your deponent has been informed that he has been deported by the Emigration authorities of Canada into the State of Vermont, from which State the said Harry K. Thaw traveled into the State of New Hampshire and your deponent is informed that he is now in the said State of New Hampshire, arrested and held pending the arrival of Extradition papers. The said Harry K. Thaw, whom I saw at Sherbrooke, was the same person for whom a warrant was issued upon the charge of Conspiracy, upon which charge Extradition is asked and is the same person who shot and killed Stanford White and the Order committing the said Harry K. Thaw to Matteawan State Hospital was signed at the conclusion of the trial of the said Harry K. Thaw for the murder of the said Stanford White by the Judge who presided at the said trial.

(Signed) RAYMOND F. C. KIEB.

Sworn to before me this
11th day of September, 1913.
(Signed) JOSEPH MORSCHAUSER
Justice Supreme Court.

"EXHIBIT A"

(attached to Kieb affidavit)

At the trial Term, Part 1, of the Supreme Court of New York, holden in and for the County of New York, in the First Judicial District of said State, for the trial of Criminal Actions, at the Building for Criminal Courts in said County, on Saturday, the first day of February, in the year of our Lord One Thousand nine hundred and eight.

Present:

The Hon. VICTOR J. DOWLING,
Justice of the Supreme Court of the State of New York.

THE PEOPLE OF THE STATE OF NEW YORK
against
HARRY K. THAW.

The defendant on his trial in said indictment having been acquitted by the jury on the ground of insanity, and the Court being certified of the fact, and the defendant being in custody, and the Court deeming his discharge at this time dangerous to public safety, it is

Ordered that said Harry K. Thaw Be Detained in Safe Custody and be Sent to the Matteawan State Hospital, there to be kept in said hospital until thence discharged by due course of law.

It is Further Ordered that the Sheriff of the County of New York do forthwith convey said Harry K. Thaw to said Hospital.

Enter,

VICTOR J. DOWLING,
Justice of the Supreme Court of the State of New York.

(*Affidavit of William Gordon*)

STATE OF NEW YORK }
COUNTY OF DUTCHESS } ss.

WILLIAM GORDON being duly sworn deposes and says:—I reside at Beacon, Dutchess County, New York. I am the proprietor of the Holland House, a hotel in said City. On Saturday, August 9, two men, who registered as Richard J. Butler and Michael O'Keefe came to my hotel, and stopped over night. On the following Friday, August 15, two men Richard J. Butler and Michael O'Keefe, accompanied by two other men, who registered as Eugene Duffy and Roger Thompson, came to my hotel at 7.45 in the evening. On Saturday, August 16 they were joined by a man who registered as Thomas Flood. Butler, O'Keefe, Duffy and Thompson, when they came on Friday, August 15 came in a five passenger Packard car. One of the four was driving. He was a very peculiar fellow. I talked with one of the men some time while they were there. I afterwards learned his name was Richard J. Butler. I said to him "What is your business?" and he said "I am in the water business." I said "Where do you get your water?" and he said "out of some bay down there." He said "I get it out of Sheepshead bay." I saw that that was a joke and we had another drink and he said "I was kidding you. And he said "Just what my business is, I am one of those fellows, and I have done it all my life." I am one of those fellows, no matter what a man does and I can help a fellow out, I will do it." On Saturday, August 16, these four men were joined by a man who registered as Thomas Flood. These men all stayed up all night on this Saturday, and as late as three o'clock Sunday morning, August 17, they were in their room. I was not up when they left on this Sunday morning. They had told me that they would be back Sunday. When Thomas Flood came on Saturday, August 16, 1913, he brought with him another car. It was a limousine car. All the men wore dark clothes and all were good looking fellows, with the exception of the big fellow. The big fellow was about 6 feet tall, middling light complexion. I don't think he has a moustache. Weight about

185 or 190 pounds. I think he had dark clothes on. He was not a very good looking fellow. He was very ugly looking and had a prominent nose. He was inclined to be rough. I came down from the Mountain about half past eleven o'clock at night and he was standing in front of the bar and no collar on and his shirt all open. He had been up to the room and came down in that condition. I think his name was Richard J. Butler.

(Signed) WILLIAM GORDON.

Sworn to before me this
11th day of September, 1913.
(Signed) JOSEPH MORSCHAUSER
Justice Supreme Court.

(*Affidavit of Lindley Churchwell.*)

STATE OF NEW YORK }
COUNTY OF DUTCHESS } ss.—

LINDLEY CHURCHWELL being duly sworn deposes and says:—I reside in the City of Beacon, New York. I am employed at the Holland House conducted by William Gordon and I have charge of the garage and run his car. This Packard car came in Friday night August 15, 1913 and this man Roger Thompson run the Packard. It was a Packard 6. I think a 1913 model, but I can't say for sure. There were numbers on the car, but I couldn't tell the number of it. I did not see the other men. Saturday August 16, 1913 Thomas Flood came as I was getting ready to come to Poughkeepsie. He was driving a two seated car (A Landaulette) that would hold five passengers. I didn't see him in the light, so that I would say that I could not recognize him. I came in about half past seven Saturday night August 16, 1913 and sold Roger Thompson twenty gallons of gasoline and nine gallons to Flood. The bill was charged to Richard Butler. I was in my room somewhere between quarter to seven and seven o'clock on the morning of Sunday August 17, 1913 and I saw the Packard leave the hotel and Roger Thompson was driving the car and only one man was with him.

I couldn't say which one it was. The landaulette went out between ten and twenty minutes after seven the same morning, and Flood was running the car and the other two men were in the landaulette. They went up Main Street towards Matteawan and that was the last I saw of them. Roger Thompson was a little under six feet and probably weighs about 160 or 165 pounds, clean shaven and square shoulders, well built and I think he had a blue suit on. He was of fair complexion. He didn't look to be a Chauffeur.

(Signed) LINDLEY H. CHURCHWELL.

Sworn to before me this
11th day of Sept. 1913.
(Signed) JOSEPH MORSCHAUSER
Justice Supreme Court.

(*Affidavit of Thomas Malloy.*)

STATE OF NEW YORK }
COUNTY OF DUTCHESS } ss.

THOMAS MALLOY being duly sworn deposed and says:—I am employed at the Matteawan State Hospital, at Beacon, New York. I am personally acquainted with and know Harry K. Thaw. I saw the said Harry K. Thaw on Sunday, August 17, 1913, at the Matteawan State Hospital about 7. 45 in the morning. He came in near where I was and got a drink out of the pump. He passed around the back end of the engine room and looked out down the road towards Glenham. This window looks out upon the road which leads up to the gate through which Thaw escaped and looks out upon the road over which the machine in which Thaw escaped came up and passed over after Thaw had entered the machine.

(Signed) THOMAS MALLOY.

Sworn to before me this
11th day of September, 1913.
(Signed) JOSEPH MORSCHAUSER
Justice Supreme Court.

(*Affidavit of James F. Maher.*)

STATE OF NEW YORK }
COUNTY OF DUTCHESS } ss.

JAMES F. MAHER being duly sworn deposes and says:—I am employed at the Matteawan State Hospital, at Beacon, New York and live at that institution. One of the windows in my room opens on the yard and faces the gate. On Sunday morning, August 17, 1913, I saw this gate open and Hickey the farmer was coming up through the yard. I know Harry K. Thaw, he being an inmate of the Matteawan State Hospital. At the time I saw Hickey, Thaw stood at one side of the opened gate and Howard Barnum, who had charge of the gate was on the other side. I went in my dressing room and in a short time I heard Barnum say "Thaw has got in an automobile and has gone away." My wife Annie Maher was in the room at the time.

(Signed) JAMES F. MAHER.

Sworn to before me this
11th day of Sept. 1913.
(Signed) JOSEPH MORSCHAUSER
Justice Supreme Court.

(*Affidavit of Annie Maher.*)

STATE OF NEW YORK }
COUNTY OF DUTCHESS } ss.

ANNIE MAHER being duly sworn deposes and says:—that she is employed at the Matteawan State Hospital, at Beacon, N. Y. On Sunday morning August 17, 1913, I was standing by the window in my room in the Hospital over the laundry which overlooks the rear gate. The bell rang and I looked out the window and saw Mr. Hickey, who brings the milk, coming in. I saw Howard Barnum open the gate and Mr. Hickey came in and started up the road inside the walls. This gate is the rear gate to the Matteawan State Hospital and Howard Barnum had charge of it on this morning. I saw an automobile coming by the opening of the gate. I saw it from the opening

where the gate was. Mr. Barnum was standing by the left side of the gate as he pulled the gate open. The automobile just seemed to be moving and did not stop. It didn't look to me as though the automobile had stopped. I didn't see Harry Thaw by the gate. However, as the automobile came up to the gate I saw two men in the car. I saw them lean forward, one in the front seat and one in the rear seat, as if they pulled someone in the car. At that time they had just got past the gate. Mr. Barnum stood by the gate and then closed the gate and walked toward the machine shop and then gave out the alarm at the kitchen and said Thaw got in an automobile. The automobile looked like a taxicab the front part open and the back part closed. This was between 7.40 and 7.55 A. M., on Sunday morning August 17, 1913. Hickey was part way up the yard when I saw him and that was the time the automobile came up.

(Signed) ANNIE MAHER.

Sworn to before me this
11th day of Sept. 1913.
(Signed) JOSEPH MORSCHAUSER,
Supreme Court Judge.

(Affidavit of Leroy G. Krum.)

STATE OF NEW YORK }
COUNTY OF DUTCHESS } ss.

LEROY G. KRUM being duly sworn deposes and says: I am employed at the Matteawan State Hospital as a chauffeur and I am personally acquainted with and know Harry K. Thaw, who was an inmate at the Matteawan State Hospital. On Sunday, August 17, about 7:45 in the morning, I was in the barn at the said institution, and saw a car apparently broken down upon the hill in the rear of said hospital, and which road goes by the rear entrance of the said Matteawan State Hospital. I looked up and saw Harry K. Thaw in the center of the gate and which gate is in the rear of said institution and opens from the yard in the rear of said Hospital.

The gate was open and Harry K. Thaw was in the center of the gate and Howard Barnum on one side. I then went into the harness shop and got my hat and came out. When we came out the car that I had seen was coming down the hill. I noticed a man who was in the automobile and who looked like Harry K. Thaw. The car was going very fast and was coming down the hill away from the gate where I had seen Thaw and towards the road which leads toward Fishkill Village. Thaw sat in the middle of the back seat. When I first saw the car it was at the entrance of the garage, between the gate and the garage. I turned and looked after it as it was going from the gate. I kept on looking at it. The car looked like a taxicab with the front glass up. Instead of the top being down it was partly up. I could not catch the number on the car. I have seen Harry Thaw in company with Barnum going down to this gate in question for the past two or three months. I have even seen him stand there when the gate was open. When I saw Thaw, he was in the middle of the opening and Barnum was on the north side. Barnum was one of the employees of the Matteawan State Hospital and had charge of this gate and he opened it to admit Hickey, the farmer with the milk.

(Signed) LEROY G. KRUM.

Sworn to before me this
11th day of Sept. 1913.

(Signed) JOSEPH MORSCHAUSER
Justice Supreme Court.

(Affidavit of Robert Lowery.)

STATE OF NEW YORK }
COUNTY OF DUTCHESS } ss.

ROBERT LOWERY being duly sworn deposes and says:—I live in Gleaham, and keep a grocery store on the State road at the corner of the road which goes to the Matteawan State Hospital. I was doing the barn work on Sunday, August 17. I heard a car come along and stopped on the road going from

Matteawan to Fishkill Village, headed east. It was a large touring car and there were two men in it. One got out of the car and went part way up the hill and stayed there. At a point where he stood it was possible to see the Hospital and the rear gate. He came down again and then went up again. He went up a third time and then I went into the house and after a few minutes I heard a car come down the hill and heard someone holler. Then I came out and saw the same man who was up there jump into the car. I saw the tail of the other car just passing the corner and I saw this man jump into the car that had been standing there, and they followed the other car toward Fishkill Village.

It was a two seated car. This man told me the car weighed 2½ tons without anyone in it. There were three men in the rear seat of the car that came down the hill. One man driving in the second car.

The man who had charge of the car was nearly 6 feet tall and had a gray suit on and a cap. He put on a pair of stained glasses while I was talking to him. The man who went up the hill had on a straw hat and a dark suit of clothes and was quite stout.

(Signed) ROBERT LOWERY.

Sworn to before me this
11th day of Sept. 1913.
(Signed) JOSEPH MORSCHAUSER.
Supreme Court Judge.

(*Affidavit of William Flannigan.*)

STATE OF NEW YORK }
COUNTY OF DUTCHESS } ss.:

WILLIAM FLANNIGAN being duly sworn deposes and says: That he resides in the City of Beacon and works for C. J. Wixon. Sunday morning August 17, 1913, about 8 o'clock, at Fishkill Village, about two and one half miles east from Matteawan State Hospital, I met two cars, the first car was a car that looked like a taxicab, partly closed, going about 80 miles an

hour. I was going toward Matteawan. Both cars passed like a flash. The second car was a touring car. When I got to Glenham, two men asked me if I had seen these cars and they told me that Thaw was in one of the cars.

(Signed) W. FLANNIGAN.

Sworn to before me this
11th day of Sept. 1913.

(Signed) JOSEPH MORSCHAUSER,
Justice Supreme Court.

(*Warrant to arrest of September 11, 1913.*)

STATE OF NEW YORK }
COUNTY OF DUTCHESS } ss.

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK TO ANY PEACE OFFICER IN THE STATE OF NEW YORK.

INFORMATION upon oath having been this day laid before me, that the crime of Conspiracy has been committed, and accusing one Harry K. Thaw, Richard J. Butler, a man about 6 feet tall, fair, light complexion, smooth shaven and weighing 185 or 190 pounds, having a large nose, and Roger Thompson, a man about 6 feet tall, weighing about 160 or 165 pounds, clean shaven, square shoulders, well built and wearing a blue suit, fair complexion, Michael O. Keefe, Eugene Duffy and and Howard Barnum, Thomas Flood.

YOU ARE, THEREFORE, COMMANDED forthwith to arrest the above named Harry K. Thaw, Richard J. Butler, Roger Thompson, Thomas Flood, Michael O. Keefe, Eugene Duffy and Howard Barnum and bring them before me at my office in the City of Poughkeepsie, County of Dutchess, New York. Dated at the City of Poughkeepsie
this 11th day of Sept. 1913.

(Signed) JOSEPH MORSCHAUSER,
Justice Supreme Court.

(Clerk's Certificate.)

STATE OF NEW YORK } ss:
COUNTY OF DUTCHESS }

I, T. J. HERRICK, Clerk of the County of Dutchess and of the County Court of said County, and of the Supreme Court of the State of New York, in and for said County, the same being Courts of Record, DO HEREBY CERTIFY: That HON. JOSEPH MORSCHAUSER, whose name is subscribed to the annexed warrant was, at the time of the issuing of such warrant of arrest, a Justice of the Supreme Court of the State of New York of the Ninth Judicial District and the said warrant is executed and issued according to the laws of the State of New York.

AND FURTHER, I DO HEREBY CERTIFY that said Joseph Morschauser was duly elected a Justice of the Supreme Court of the State of New York of the Ninth Judicial District, which embraces the County of Dutchess and duly sworn, and is still acting as such Justice of the Supreme Court of the State of New York, and as such was duly authorized and empowered to issue the within warrant.

IN TESTIMONY WHEREOF I have hereunto set my hand and [SEAL] affixed the seal of said Courts and County this 11th day of September, 1913.

(Signed) T. J. HERRICK,
Clerk.

(Certificate of Justice Morschauser.)

STATE OF NEW YORK } ss:—
COUNTY OF DUTCHESS }

I, JOSEPH MORSCHAUSER, Justice of the Supreme Court of the State of New York, duly commissioned and sworn as such Justice and residing in the City of Poughkeepsie, Dutchess County, New York, do hereby certify as follows:

That the copy hereto annexed of the information dated September 11, 1913, of Edward A. Conger, charging one Harry K. Thaw and others upon a charge of conspiracy, a misdemeanor,

is a true copy of the original information sworn to before me and which I have since filed in the County Clerk's office of the County of Dutchess.

That the copy hereto annexed of the depositions taken in support of the said information against the said Harry K. Thaw upon the said charge of Conspiracy, are true copies of the original depositions taken and sworn to before me and which are on file in my office.

That the copy hereto annexed of the warrant for the arrest of the said Harry K. Thaw is a true copy of the warrant issued by me on September 11, 1913, and delivered to said Fred C. Hornbeck, Sheriff of the County of Dutchess.

That I am acquainted with Edward A. Conger, the complainant who made the said information and with Robert Lowery, Lindley Churchwell, William Gordon, Annie Maher and William Flannigan, whose depositions accompany the said information and know them to be respectable persons and entitled to credit.

That in my opinion, this is a proper case for requisition.

Dated September 11, 1913.

(Signed) JOSEPH MORSCHAUSER,
Justice of the Supreme Court.

(Clerk's Certificate.)

STATE OF NEW YORK }
COUNTY OF DUTCHESS } ss:

I, T. J. HERRICK, Clerk of the County of Dutchess and of the County Court of said County, and of the Supreme Court of the State of New York, in and for said County, the same being Courts of Record, DO HEREBY CERTIFY: That HON. JOSEPH MORSCHAUSER whose name is subscribed to the certificate hereto annexed, was, at the time of making such certificate, a Justice of the Supreme Court of the State of New York of the Ninth Judicial District.

AND FURTHER: That I am well acquainted with the handwriting of such Justice and verily believe that the signature

to the said Certificate is genuine and that the same is executed according to the laws of the State of New York.

AND FURTHER, I DO HEREBY CERTIFY that said Joseph Morschauser was duly elected a Justice of the Supreme Court of the State of New York of the Ninth Judicial District, which embraces the County of Dutchess and duly sworn, and is still acting as such Justice of the Supreme Court of the State of New York, and as such was duly authorized and empowered to issue the within warrant.

IN TESTIMONY WHEREOF, I have hereunto set my hand and [SEAL] affixed the seal of said Courts and County this 11th day of September, 1913.

(Signed) T. J. HERRICK,
Clerk.

(*Affidavit of Fred C. Hornbeck*)

STATE OF NEW YORK }
DUTCHESS COUNTY, } ss:

FRED C. HORNBECK being duly sworn deposes and says that he is a peace officer to wit:—the Sheriff of the County of Dutchess; that on or about the 11th day of September, 1913, a warrant for the arrest of Harry K. Thaw, Richard J. Butler, Roger Thompson, Thomas Flood, Michael O. Keefe, Eugene Duffy and Howard Barnum, was placed in his hands charging the said Harry K. Thaw, Richard J. Butler, Roger Thompson, Thomas Flood, Michael O. Keefe, Eugene Duffy and Howard Barnum, with the crime of Conspiracy in conspiring to effect the escape of said Harry K. Thaw from the Matteawan State Hospital where he was confined as an inmate thereof. I know and am acquainted with the said Harry K. Thaw and know that he was confined in the said Matteawan State Hospital as an inmate thereof having seen and talked with him at the said institution.

I am unable to arrest the said Harry K. Thaw in the State of New York for the reason that he is not now in the State of New York, but is in the State of New Hampshire, from which State requisition is asked. On Sunday, August 17, 1913, I went to Matteawan and was there informed that the said Harry

K. Thaw had escaped from the Matteawan State Hospital where he had been confined as an inmate. Subsequently and on or about the nineteenth day of August, 1913, I learned that the said Harry K. Thaw had been arrested at Coaticook, Canada. On or about the 20th day of August 1913 I went to Canada and I there found, at Sherbrooke, Canada, the said Harry K. Thaw, under arrest charged with having escaped from the said Matteawan State Hospital, he being the same man for whom the warrant of conspiracy has been issued and I am now informed that the said Harry K. Thaw is now under arrest in the State of New Hampshire, at Colebrook in charge of Holman A. Drew, the Sheriff of Coos County, New Hampshire.

(Signed) FRED C. HORNBECK.

Subscribed and sworn to before
me this 11 day of Sept., 1913
JOSEPH MORSCHAUSER
Justice Supreme Court

(Clerk's Certificate.)

STATE OF NEW YORK }
COUNTY OF DUTCHESS } ss:

I, T. J. HERRICK, Clerk of the County of Dutchess, and of the County Court of said County, and of the Supreme Court of the State of New York, in and for said County, the same being Courts of Record, DO HEREBY CERTIFY: That HON. JOSEPH MORSCHAUSER, whose name is subscribed to the certificate of the proof of acknowledgment of the annexed instrument, and thereon written, was at the time of taking such proof or acknowledgment a Justice of the Supreme Court of the State of New York of the Ninth Judicial District and was duly authorized to take the same by the Laws of the State of New York. AND FURTHER: That I am well acquainted with the handwriting of such Justice and verily believe that the signature to the said Certificate of Proof or acknowledgment is genuine and that the same is executed and acknowledged according to the laws of the State of New York.

AND FURTHER, I DO HEREBY CERTIFY that said Joseph Morschauser was duly elected a Justice of the Supreme Court of the State of New York of the Ninth Judicial Department, which embraces the County of Dutchess and duly sworn and is still acting as such Justice of the Supreme Court of the State of New York, and as such was duly authorized and empowered to issue the within warrant.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said Courts and County this 11th day of September, 1913.

(SEAL)

(Signed) T. J. HERRICK,
Clerk.

(Affidavit of Raymond F. C. Kieb.)

STATE OF NEW YORK }
COUNTY OF DUTCHESS } ss:

RAYMOND F. C. KIEB being duly sworn deposes and says:—
am the regularly appointed and acting Medical Superintendent
f Matteawan State Hospital, a Hospital for the criminal in-
ane, and I have been such Medical Superintendent from the
xth day of June, 1913. One Harry K. Thaw was confined in
aid Matteawan State Hospital and has been confined there
nce February 1, 1908. Annexed hereto and made a part of
is affidavit is a copy of the Order committing the said Harry
. Thaw to the Matteawan State Hospital. At the time the
id Harry K. Thaw was committed to the said Matteawan
ate Hospital, I was one of the assistant physicians at the said
ospital and was present at the time the said Thaw was ad-
tted to the said institution. I met him at the institution
d received him from the officers from New York City and
tered his name upon the records at the institution. The
d Harry K. Thaw has never been discharged from the said
titution and has been an inmate thereof from the date of his
nission until the seventeenth day of August, 1913, at which
t date he escaped. The said Harry K. Thaw was in the
tteawan State Hospital, confined as an inmate, to my own
owledge, up to the said seventeneth day of August, 1913.

The crime, the commission of which he is now accused of is that of Conspiracy, in conspiring with Richard J. Butler and others to effect his (Thaw's) escape from the said Matteawan State Hospital and at the time of the commission of the said crime he was in the State of New York, at the City of Beacon. Thaw left the said institution about 7:45 in the morning of August 17, having escaped through the rear gate of the said institution and jumped into an automobile which was then and there waiting for him, and disappeared. I was unable to obtain any knowledge of him until about Wednesday, at which time I was informed that he had been arrested at Coaticook, Canada, and charged there with having escaped from the said Matteawan State Hospital. Upon my order he was held and was later sent to Sherbrooke, Canada and there held in custody. On or about the 25th of August, 1913, I went to Canada and on the 27th day of August, 1913, I saw the said Harry K. Thaw in the Court room at Sherbrooke, Canada, he being then in custody, charged with having escaped from the said Matteawan State Hospital and at the time I saw him he was then remanded by the Justice holding the said Court, to the Sherbrooke Jail to await the action on the said charge. At that time I was informed that the Emigration authorities of Canada were waiting until Harry K. Thaw should be discharged from the Sherbrooke Jail, to arrest him for having entered the country by stealth, at which time proceedings were to be commenced to deport him from the Dominion of Canada upon the ground above stated and upon the further ground that he is an insane person and had been in an institution for the insane within five years. Harry K. Thaw is about 43 years of age and as far as your deponent knew, had no occupation. Your deponent says that the said Harry K. Thaw was within the State of New York at the time of the commission of the crime for which requisition is asked and departed from this State on or about the seventeenth day of August, 1913. Your deponent has been informed that he has been deported by the Emigration authorities of Canada into the State of Vermont, from which State the said Harry K. Thaw traveled into the State of New Hampshire and your deponent is informed that he is now in the said State of New Hampshire.

arrested and held pending the arrival of Extradition papers. The said Harry K. Thaw, whom I saw at Sherbrooke, was the same person for whom a warrant was issued upon the charge of Conspiracy, upon which charge Extradition is asked and is the same person who shot and killed Stanford White and the Order committing the said Harry K. Thaw to Matteawan State Hospital was signed at the conclusion of the trial of the said Harry K. Thaw for the murder of the said Stanford White, by the Judge who presided at the said trial

(Signed) RAYMOND F. C. KIEB.

Sworn to before me this
11th day of September, 1913.

(Signed) JOSEPH MORSCHAUSER,
Justice Supreme Court.

"EXHIBIT A"

At a Trial Term, Part 1, of the Supreme Court of New York, holden in and for the County of New York, in the First Judicial District of said State, for the trial of Criminal Actions at the Building for Criminal Courts in said County, on Saturday, the first day of February, in the year of our Lord One Thousand nine hundred and eight.

resent:

The Hon. Victor J. Dowling,
Justice of the Supreme Court of the State of New York.

IE PEOPLE OF THE STATE OF NEW YORK
against
HARRY K. THAW

The defendant on his trial in said indictment having been uitted by the jury on the ground of insanity, and the Court ig certified of the fact, and the defendant being in custody, the Court deeming his discharge at this time dangerous ublic safety, it is

ORDERED that said Harry K. Thaw BE DETAINED IN SAFE CUSTODY AND BE SENT TO THE MATTEAWAN STATE HOSPITAL, there to be kept in said hospital until thence discharged by due course of law.

IT IS FURTHER ORDERED that the Sheriff of the County of New York do forthwith convey said Harry K. Thaw to said Hospital.

Enter,

VICTOR J. DOWLING,
Justice of the Supreme Court of the State of New York.

(Clerk's Certificate.)

STATE OF NEW YORK }
COUNTY OF DUTCHESS } ss:

I, T. J. HERRICK, Clerk of the County of Dutchess, and of the County Court of said County, and of the Supreme Court of the State of New York, in and for said County, the same being Courts of Record, DO HEREBY CERTIFY: That HON. JOSEPH MORSCHAUSER, whose name is subscribed to the certificate of the proof or acknowledgment of the annexed instrument, and thereon written, was at the time of taking such proof or acknowledgment a JUSTICE OF THE SUPREME COURT of the State of New York of the Ninth Judicial District, and was duly authorized to take the same by the Laws of the State of New York. AND FURTHER: That I am well acquainted with the handwriting of such Justice, and verily believe that the signature to the said Certificate of Proof or Acknowledgment is genuine, and that the same is executed and acknowledged according to the Laws of the State of New York.

AND FURTHER, I DO HEREBY CERTIFY that said JOSEPH MORSCHAUSER was duly elected a Justice of the Supreme Court of the State of New York, of the Ninth Judicial Department, which embraces the County of Dutchess, and duly sworn, and is still acting as such JUSTICE OF THE SUPREME COURT of the State of New York, and as such was duly authorized and empowered to issue the within warrant.

IN TESTIMONY WHEREOF, have hereunto set my hand and affixed the seal of said Courts and County this 11th day of September, 1913.

[SEAL]

(Signed) T. J. HERRICK,
Clerk.

(Affidavit of John E. Mack.)

STATE OF NEW YORK }
COUNTY OF ALBANY } ss:

JOHN E. MACK being duly sworn deposes and says: That during the six years preceding January 1st, 1913 he was District Attorney of the County of Dutchess, New York, and in his official capacity became acquainted with Harry K. Thaw, who was confined in Matteawan State Hospital up to August 17th, 1913, having been committed there upon the verdict of a trial jury in the County of New York of not guilty of murder on the ground of insanity; that on August 27th, 1913, deponent saw the said Harry K. Thaw at the Court Room in Sherbrooke, Canada and the said Thaw recognized deponent and spoke to him and called him by his name.

That acting for the State of New York deponent employed one Bernard Jacobs of Lancaster, N. H. to represent the State of New York in case said Thaw should be deported from Canada to New Hampshire, and deponent also arranged with Holman A. Drew, Sheriff of Coös County, New Hampshire, to arrest the said Harry K. Thaw in case he should be deported into New Hampshire.

That the said Holman A. Drew on the 26th day of August, 1913 accompanied deponent from Lancaster to Sherbrooke and to the Court Room and the said Holman A. Drew then and there saw the said Harry K. Thaw and is well acquainted with him and with his personal appearance.

That on the 10th day of September, 1913 the said Bernard Jacobs of Lancaster, N. H. telephoned to deponent and deponent talked with the said Jacobs over the telephone and the said Jacobs then and there informed deponent over the telephone that the said Harry K. Thaw was at Colebrook, N. H. and had

been arrested there by the said Holman A. Drew and was detained by the said Holman A. Drew, as sheriff of Co"s County, New Hampshire, as a fugitive from justice awaiting extradition.

That Colebrook, New Hampshire is a short distance from the Canadian line and from Coaticook where the said Thaw was detained previous to September 10th, 1913.

That deponent is well acquainted with Franklin Kennedy, Deputy Attorney General of the State of New York, who represented the State of New York at the hearing in Court at Sherbrooke and deponent was present with the said Franklin Kennedy and the said Franklin Kennedy saw the said Harry K. Thaw and is well acquainted with him and with his personal appearance.

(Signed) JOHN E. MACK.

Subscribed and sworn to before me
this 12th day of September, 1913.
(Signed) W. M. THOMAS,
Notary Public.

(*Affidavit of James A. Parsons.*)

STATE OF NEW YORK }
COUNTY OF ALBANY } ss:

JAMES A. PARSONS being duly sworn says: That he is a Deputy Attorney General of the State of New York and is well acquainted with Franklin Kennedy, who is also a Deputy Attorney General of the State of New York.

That deponent is informed and believes that one Harry K. Thaw, for whom a warrant has been issued by Joseph Morschauser, Justice of the Supreme Court, is now in the State of New Hampshire at Colebrook, Co"s County, in the custody of the sheriff of that county, Holman A. Drew; that the source of deponent's knowledge and the grounds of his information are:

That on the 11th day of September, 1913, deponent had a conversation with said Franklin Kennedy over the telephone

from Colebrook, N. H.; that said Franklin Kennedy informed deponent that said Harry K. Thaw was at Colebrook, N. H. in the custody of said sheriff; that the said Franklin Kennedy had seen Thaw in said custody; that deponent knows that said Franklin Kennedy is well acquainted with said Harry K. Thaw; that said Franklin Kennedy has represented the State of New York in several proceedings involving the custody of said Harry K. Thaw; that within the year last past said Franklin Kennedy was one of the attorneys representing the State of New York at a hearing held before Justice Keogh at White Plains, N. Y. which said hearing was upon a writ of habeas corpus involving the question of the discharge of said Harry K. Thaw from Matteawan State Hospital, and that said Harry K. Thaw was in Court during said proceedings.

(Signed) JAMES A. PARSONS.

Subscribed and Sworn to before me
this 12th day of September, 1913.

(Signed) W. M. THOMAS,
Notary Public.

STATE OF NEW YORK
COUNTY OF ALBANY, CLERK'S OFFICE } ss:

I, WILLIAM J. GRATTAN, Clerk of the said County, and also clerk of the Supreme and County Courts, being Courts of Record held therein, DO HEREBY CERTIFY that W. M. Thomas whose name is subscribed to the jurat of the annexed affidavit, was on the day of the date thereof, a NOTARY PUBLIC, in and for the County of Albany dwelling in said County, duly authorized to administer oaths for general purposes; and that I am well acquainted with the handwriting of said NOTARY PUBLIC, and verily believe that the signature to said jurat is genuine. IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal this 12th day of September 1913.

[SEAL.]

(Signed) WM. J. GRATTAN, *Clerk.*

(*Filing.*)

In the Matter of the Application for requisition for the return of

HARRY K. THAW, a fugitive from justice

EDWARD A. CONGER,
District Attorney
Dutchess County
New York

(*Appointment of Fred C. Hornbeck to convey H. K. Thaw to New York under date of October 24, 1913.*)

STATE OF NEW YORK.

Executive Chamber.

The Governor of the State of New York
To All to Whom These Presents Shall Come.

Know Ye, That I have authorized and empowered, and by these Presents do authorize and empower

Fred C. Hornbeck

who is a public officer, to wit: Sheriff of Dutchess Co., to take and receive from the proper authorities of the state of New Hampshire

Harry K. Thaw

a fugitive from justice, and convey him to the State of New York, there to be dealt with according to Law.

In Witness Whereof I have hereunto signed my name and affixed the Privy Seal of the State, at the Capitol in the City of Albany, this twenty-fourth day of October in the year of our Lord one thousand nine hundred and thirteen.

By the Governor:

MARTIN H. GLYNN.

FRANK A. TIERNEY,
Secretary to the Governor.

(Requisition Papers of October 24, 1913.)

STATE OF NEW YORK.

EXECUTIVE CHAMBER.

THE GOVERNOR OF THE STATE OF NEW YORK
TO THE GOVERNOR OF THE STATE OF NEW HAMPSHIRE.

WHEREAS, It appears by the papers required by the Statutes of the United States, which are hereunto annexed, and which I certify to be authentic and duly authenticated in accordance with the Laws of this State, that

HARRY K. THAW

stands charged with the crime of Conspiracy, which I certify to be a crime under the laws of this state, committed in the County of Dutchess, in this state, and it having been represented to me that he had fled from the justice of this state, and may have taken refuge in the State of New Hampshire.

Now Therefore, pursuant to the provisions of the Constitution and the Laws of the United States in such case made and provided, I do hereby require that the said

HARRY K. THAW

be apprehended and delivered to FRED C. HORNBECK who is hereby authorized to receive and convey him to the State of New York, there to be dealt with according to Law.

IN WITNESS WHEREOF, I have hereunto signed my name and affixed the Privy Seal of the State, at the Capitol in the City of Albany, this twenty-fourth day of October in the year of our Lord one thousand nine hundred and thirteen.

[NEW YORK STATE SEAL]

By the Governor:

MARTIN H. GLYNN.

FRANK A. TIERNEY,
Secretary to the Governor.

(Application of Attorney General Carmody for Requisition Papers.)

OFFICE OF THE ATTORNEY GENERAL
OF THE STATE OF NEW YORK.

TO THE GOVERNOR OF THE STATE OF NEW YORK.

Sir:

In compliance with your rules in reference to applications for requisitions on governors of other states and territories, and the Chief Justice of the Supreme Court of the District of Columbia, I have the honor herewith to make application for a requisition upon the Governor of the State of New Hampshire for Harry K. Thaw, who stands indicted in this county for the crime of conspiracy and who, as appears from the annexed affidavit of Raymond F. C. Kieb, who is a respectable person and entitled to credit, is a fugitive from the justice of this state, and is now in the said State of New Hampshire.

I HEREBY CERTIFY:

A. That the full name of the person for whom the requisition is asked is Harry K. Thaw, and the name of the person whom I hereby propose for designation as the agent of this state herein is Fred C. Hornbeck.

B. That in my opinion the ends of justice require that the fugitive be brought to this state for trial, at the public expense.

C. That I have, as I believe, sufficient evidence to secure a conviction of the fugitive.

D. That the person above proposed as agent is the Sheriff of Dutchess County, a public officer, and a proper person to be so designated, and that he has no private interest in the arrest of the fugitive.

E. A former application for a requisition for this fugitive growing out of the transaction from which the indictment herein originated, was made in the month of September, 1913, and the reason for this second application is that the prior application was founded on depositions taken before a Justice of the Supreme Court sitting as a

committing magistrate, no indictment against the fugitive at that time having been found. Now that an indictment has been found this application is made in order that an authenticated copy of such indictment may accompany the papers.

F. That the fugitive is now under arrest in the City of Concord, in the State of New Hampshire, in proceedings instituted for his rendition as a fugitive from the justice of this state.

G. That this application is not made for the purpose of enforcing the collection of a debt, or of avoiding the penalty of a bail bond, or for any private purpose whatever, and that if the requisition applied for be granted, the criminal proceedings shall not be used for any of said purposes.

H. That the several sets of papers in duplicate herein have been compared with each other, and are, in all respects, exact counterparts.

I. That the fugitive is charged with the commission of a misdemeanor under section 580 of the Penal Law of this state, which provides that if two or more persons conspire to commit any act for the perversion or obstruction of justice or of the due administration of the laws, each of them is guilty of a misdemeanor, and is punishable by imprisonment in a Penitentiary or County Jail for not more than one year or by a fine of not more than five hundred dollars or by both.

J. That not more than one year has elapsed since the commission of the offense charged in this indictment. Certified copies in duplicate of the indictment against the fugitive, duplicate original warrants issued for his arrest, and duplicate original returns thereto are attached to this application.

I am, sir,

Yours very respectfully,

THOMAS CARMODY,

Attorney General of the State of New York.

THE CITY OF NEW YORK, October 23rd, 1913.

(*Indictment.*)

SUPREME COURT, NEW YORK COUNTY.

THE PEOPLE OF THE STATE OF NEW YORK.

against

HARRY K. THAW
RICHARD J. BUTLER
EUGENE DUFFY
MICHAEL O'KEEFE
THOMAS FLOOD
AND
ROGER THOMPSON

The Grand Jury of the County of New York, by this indictment, accuse Harry K. Thaw, Richard J. Butler, Eugene Duffy, Michael O'Keefe, Thomas Flood and Roger Thompson of the Crime of Conspiracy, committed as follows:—

Heretofore, to wit, on the first day of February, in the year of our Lord one thousand nine hundred and eight, at a trial term, Part One of the Supreme Court of the State of New York, in the County of New York, in the First Judicial District, held for the trial of criminal actions, there was duly made and entered by the Honorable Victor J. Dowling, a Justice of the said Court, a certain order which was then and there as follows, to wit:—

> At a Trial Term, Part 1, of the Supreme Court of New York, holden in and for the County of New York, in the First Judical District of said State, for the trial of Criminal Actions, at the Building for Criminal Courts in said County, on Saturday, the first day of February, in the year of our Lord one thousand nine hundred and eight.

Present:

The Hon. VICTOR J. DOWLING,
Justice of the Supreme Court of the State of New York.

THE PEOPLE OF THE STATE OF NEW YORK

against

HARRY K. THAW

The defendant on his trial in said indictment having been acquitted by the jury on the ground of insanity, and the Court being certified of the fact, and the defendant being in custody, and the Court deeming his discharge at this time dangerous to public safety, it is

ORDERED that said Harry K. Thaw be detained in safe custody and be sent to the Matteawan State Hospital there to be kept in said hospital until thence discharged by due course of law.

IT IS FURTHER ORDERED that the Sheriff of the County of New York do forthwith convey said Harry K. Thaw to said Hospital.

Enter,

VICTOR J. DOWLING,

Justice of the Supreme Court of the State of New York.

And thereupon the said Harry K. Thaw, pursuant to the terms of the said order, was sent to the said Matteawan State Hospital and confined therein, the said hospital being a hospital duly established by and under the laws of the State of New York to be used for the purpose of holding in custody and caring for such insane persons as might be committed thereto by courts of jurisdiction of the said State, and situated in the County of Dutchess, in the said State;

And afterwards, to wit, on or about the fourteenth day of August, in the year of our Lord one thousand nine hundred and thirteen, but on what particular day the Grand Jury is unable more particularly to set forth, the said Harry K. Thaw being then and there so in confinement in the said Matteawan State Hospital as aforesaid, the said Harry K. Thaw, Richard J. Butler, Eugene Duffy, Michael O'Keefe, Thomas Flood and Roger Thompson, well knowing the premises, at the Borough

of Manhattan of the City of New York, in the County of New York aforesaid, did unlawfully, fraudulently and maliciously conspire, combine, confederate and agree together between and among themselves and with divers other evil disposed persons to the Grand Jury aforesaid as yet unknown, illegally and fraudulently to cause and procure the said Harry K. Thaw to escape from the said hospital and illegally to go at large, by such dishonest, corrupt, fraudulent, deceitful and illegal means, methods, devices and practices as they should thereafter deem available, to the great and manifest perversion and obstruction of justice and of the due administration of the laws;

And the said Richard J. Butler and Michael O'Keefe, in pursuance and furtherance of and according to the said conspiracy, combination, confederacy and agreement as aforesaid and to effect the purposes thereof, afterwards, to wit, on the said fourteenth day of August, in the said year of 1913, at the Borough of Manhattan of the City of New York, in the County of New York aforesaid, did hire and procure from one John Collins a certain automobile;

And the said Richard J. Butler, Michael O'Keefe and Roger Thompson, in the further pursuance and furtherance of and according to the said conspiracy, combination, confederacy and agreement, and to effect the purposes thereof, afterwards, to wit, on the said fourteenth day of August, in the said year one thousand nine hundred thirteen, did drive the said automobile to the City of Beacon in the said County of Dutchess, in which said city the said Matteawan State Hospital was situated;

And the said Richard J. Butler, Eugene Duffy, Michael O'Keefe, Thomas Flood, and Roger Thompson, in the further pursuance and furtherance of, and according to the said conspiracy, combination, confederacy and agreement, and to effect the purposes thereof, afterwards, to wit, on the seventeenth day of August, in the said year one thousand nine hundred thirteen, did drive the said automobile to the said Matteawan State Hospital and did there await the said Harry K. Thaw;

And the said Harry K. Thaw, in the further pursuance and furtherance of and according to the said conspiracy, combination, confederacy and agreement as aforesaid and to effect the

purposes thereof, afterwards, to wit, on the said seventeenth day of August, in the said year, at the said County of Dutchess did illegally leave and escape from the said Matteawan State Hospital and did enter the said automobile and did therein leave the said county of Dutchess and the said State of New York.

And the said Richard J. Butler, Eugene Duffy, Michael O'Keefe, Thomas Flood and Roger Thompson, in the further pursuance and furtherance of and according to the said conspiracy, combination, confederacy and agreement as aforesaid and to effect the purposes thereof, did thereupon take, carry and accompany the said Harry K. Thaw in the said automobile from and out of the said County of Dutchess and from and out of the State of New York, against the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

THOMAS CARMODY,
Attorney General of the State of New York.

Witnesses:

DR. RAYMOND F. C. KIEB
JOHN COLLINS
RICHARD R. FOX
WM. GORDON
LINDLEY CHURCHWELL
JAMES R. MURRAY
JAMES HICKEY
THOS. MOLLOY
ANNIE MAHER
JAS. F. MAHER
LEROY J. CRUM
ROBT. LOWERY
CHAS. SWANSON
WM. TRAVERS JEROME
GEO. S. TURNER
CHAS. B. PECK
JN. B. HAWKISON

Supreme Court
Counsel I B
Filed 23d day of October, 1913.
Pleads

THE PEOPLE
vs.
HARRY K. THAW
RICHARD J. BUTLER
EUGENE DUFFY
MICHAEL O'KEEFE
THOMAS FLOOD
AND
ROGER THOMPSON

Conspiracy

THOMAS CARMODY,
Attorney General.

A true bill

G. H. PUTNAM,
Foreman.

STATE OF NEW YORK
COUNTY OF NEW YORK } ss:

I, WILLIAM F. SCHNEIDER, Clerk of the said County and Clerk of the Supreme Court of said State for said County, DO CERTIFY, That I have compared the preceding with the original certificate of

Record

on file in my office, and that the same is a correct transcript therefrom, and of the whole of such original.

Indorsed Filed Oct. 23, 1913.

[SEAL.] In witness whereof, I have hereunto subscribed my name and affixed my official seal, this 23d day of Oct. 1913.

WM. F. SCHNEIDER,
Clerk.

(Warrant to Arrest.)

SUPREME COURT, PART ONE,
CRIMINAL TRIAL TERM.

COUNTY OF NEW YORK, ss.

In the Name of the People of the State of New York, To any Peace Officer in this State

[SEAL.] An indictment having been found on the 23d day of October 1913, in the Court of General Sessions of the Peace of the County of New York, charging Harry K. Thaw with the crime of conspiracy.

You are therefore commanded forthwith to arrest the above named Harry K. Thaw and bring him before the Supreme Court in the County of New York, to answer the indictment; or if the court have adjourned for the term, that you deliver him into the custody of the Keeper of the City Prison of the City of New York, in the Borough of Manhattan of the said City; or if he require it, that you take him before any magistrate in that county, or in the county in which you arrest him, that he may give bail to answer the indictment.

Dated at the Borough of Manhattan in the City of New York, the 23d day of October, 1913.

By order of the Court,
WILLIAM F. SCHNEIDER, *Clerk*.

Supreme Court,
Part 1 Criminal Trial Term.
County of New York

THE PEOPLE OF THE STATE OF NEW YORK
against
HARRY K. THAW

——CH WARRANT FOR MISDEMEANOR.
——ed October 23, 1910.

The defendant to be admitted to bail in the sum of..... dollars.

(Officer's Return.)

To the Supreme Court
County of New York } ss:

The return of Edward F. Rayens, a detective of the Police Force of the City of New York, respectfully shows to the Court that the within named Harry K. Thaw can not with due diligence be found within the State of New York.

Dated at the City and County of New York this twenty-third day of October, 1913.

EDWARD F. RAYENS,
Detective.

(Affidavit of Raymond F. C. Kieb.)

United States of America
State of New York
In the Matter
of
HARRY K. THAW
A Fugitive from the Justice of the
State of New York

Affidavit
As to Flight, etc.

County of New York
Borough of Manhattan
of the City of New York } ss:

Raymond F. C. Kieb, being duly sworn, deposes and says: I am the principal complaining witness against the above named Harry K. Thaw who is charged with having on or about the fourteenth day of August, in the year one thousand nine hundred and thirteen, at the Borough of Manhattan of the City of New York, in the County and State of New York, conspired with one Richard J. Butler, one Eugene Duffy, one Michael O'Keefe, one Thomas Flood and one Roger Thompson, to cause and procure him, the said Harry K. Thaw, illegally and fraud-

ulently to escape from the Matteawan State Hospital where he was then confined, and pursuant to such conspiracy having thereafter committed various overt acts among which was his illegally escaping from the said hospital on August seventeenth, in the said year.

The said Harry K. Thaw was actually in the said State on the day of the commission of said crime and was seen there on the fourteenth, fifteenth and sixteenth days of August, in the said year, by me.

After the commission of the said crime, to wit, on or about the seventeenth day of August, 1913, for the purpose of avoiding prosecution for the said crime, the said Harry K. Thaw fled from the justice of this state, and is now in the City of Concord, in the State of New Hampshire, a fugitive from justice, as I have reason to believe, for the following reasons, to wit: I am informed by the Sheriff of Dutchess County that the said Harry K. Thaw has been arrested and is now in custody at the said City of Concord, in the said State of New Hampshire, in proceedings instituted for his extradition as a fugitive from the justice of this state.

This application is made in good faith, for the sole purpose of punishing the accused, and it is not intended or desired to use the prosecution or to obtain the requisition for the purpose of collecting a debt or for any private purpose whatever, and if the requisition be issued the prosecution shall not be used directly or indirectly for any of the said purposes.

The said Harry K. Thaw is about forty-two years of age, and has no occupation, and is a resident of this state, his home being at the Matteawan State Hospital, in the City of Beacon, in Dutchess County, in the State of New York, where he has lived for five years, as I am informed and verily believe.

RAYMOND F. C. KIEB.

Sworn to before me this
23d day of October, 1913.

L. HARDING ROGERS, JR.,
Notary Public,
County of New York.

STATE OF NEW YORK
COUNTY OF NEW YORK } ss:

No. 32095

I, WILLIAM F. SCHNEIDER, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, Do HEREBY CERTIFY, That L. Harding Rogers, Jr. before whom the annexed deposition was taken, was, at the time of taking the same, a Notary Public of New York, dwelling in said County, duly appointed and sworn, and authorized to administer oaths to be used in any Court in said State, and for general purposes: that I am well acquainted with the handwriting of said Notary, and that his signature thereto is genuine, as I verily believe.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Court and County, the 23d day of Oct. 1913.

W. F. SCHNEIDER,
Clerk.

(Filing.)

STATE OF NEW YORK

In the Matter
of
HARRY K. THAW
A Fugitive From the Justice of the State of New York.

Application for Requisition.

THOMAS CARMODY,
Attorney General.

State of New York
to
The Governor of the State of New York.

(Certificate of Edward N. Pearson.)

(Copy)

STATE OF NEW HAMPSHIRE

DEPARTMENT OF STATE

(SEAL)

To all to whom these Presents Shall Come, GREETING:

I, EDWARD N. PEARSON, Secretary of State of the State of New Hampshire, do hereby certify that the following and hereto attached is a true copy of application of the Governor of New York for the Rendition of Harry K. Thaw and a true copy of agent's authority, the originals of which were filed in this office on November 6, 1913, at 10.45 A. M.

IN TESTIMONY WHEREOF, I hereto set my hand and cause to be affixed the Seal of the State, at Concord, this 7th day of November A. D. 1913.

[SEAL.]

(Signed) EDWARD N. PEARSON,
Secretary of State.

(Requisition Papers of November 6, 1913.)

STATE OF NEW YORK.

EXECUTIVE CHAMBER

THE GOVERNOR OF THE STATE OF NEW YORK

TO THE GOVERNOR OF THE STATE OF NEW HAMPSHIRE

WHEREAS, it appears by the papers required by the Statutes of the United States, which are hereunto annexed, and which I certify to be authentic and duly authenticated in accordance with the Laws of this State, that

HARRY K. THAW

stands charged with the crime of conspiracy which I certify to be a crime under the Laws of this State, committed in the County of New York, in this State, and it having been represented to me that he has fled from the justice of this State, and may have taken refuge in the State of New Hampshire.

Now Therefore, pursuant to the provisions of the Constitution and the Laws of the United States in such case made and provided, I do hereby require that the said

HARRY K. THAW

be apprehended and delivered to Fred C. Hornbeck who is hereby authorized to receive and convey him to the State of New York, there to be dealt with according to Law.

IN WITNESS WHEREOF, I have hereunto signed my name and affixed the Privy Seal of the State, at the Capitol in the City of Albany, this sixth day of November in the year of our Lord one thousand nine hundred and thirteen.

[SEAL.]

By the Governor:

MARTIN H. GLYNN.

FRANK A. TIERNEY,
Secretary to the Governor.

(*Application of Attorney General Carmody for requisition papers.*)

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK
TO THE GOVERNOR OF THE STATE OF NEW YORK.

Sir:

In compliance with your rules in reference to applications for requisitions on governors of other states and territories, and the Chief Justice of the Supreme Court of the District of Columbia, I have the honor herewith to make application for a requisition upon the Governor of the State of New Hampshire for Harry K. Thaw, who stands indicted in this county for the crime of conspiracy and who, as appears from the annexed affidavit of Raymond F. C. Kieb, who is a respectable person and entitled to credit, is a fugitive from the justice of this state, and is now in the said State of New Hampshire.

I HEREBY CERTIFY:

A. That the full name of the person for whom the requisition is asked is Harry K. Thaw, and the name of the person whom I hereby propose for designation as the agent of this state herein is Fred C. Hornbeck.

B. That in my opinion the ends of justice require that the fugitive be brought to this state for trial, at the public expense.

C. That I have, as I believe, sufficient evidence to secure a conviction of the fugitive.

D. That the person above proposed as agent is the Sheriff of Dutchess County, a public officer, and a proper person to be so designated, and that he has no private interest in the arrest of the fugitive.

E. A former application for a requisition for this fugitive growing out of the transaction from which the indictment herein originated, was made in the month of September, 1913, and the reason for this second application is that the prior application was founded on depositions taken before a Justice of the Supreme Court sitting as a committing magistrate, no indictment against the fugitive at that time having been found. Now that an indictment has been found this application is made in order that an authenticated copy of such indictment may accompany the papers.

F. That the fugitive is now under arrest in the city of Concord, in the state of New Hampshire, in proceedings instituted for his rendition as a fugitive from the justice of this state.

G. That this application is not made for the purpose of enforcing the collection of a debt, or of avoiding the penalty of a bail bond, or for any private purpose whatever, and that if the requisition applied for be granted, the criminal proceedings shall not be used for any of said purposes.

H. That the several sets of papers in duplicate herein have been compared with each other, and are, in all respects, exact counterparts.

I. That the fugitive is charged with the commission of a misdemeanor under section 580 of the Penal Law of this state, which provides that if two or more persons conspire to commit any act for the perversion or obstruction of justice or of the due administration of the laws, each

of them is guilty of a misdemeanor, and is punishable by imprisonment in a Penitentiary or County Jail for not more than one year or by a fine of not more than five hundred dollars or by both.

J. That not more than one year has elapsed since the commission of the offense charged in this indictment. Certified copies in duplicate of the indictment against the fugitive, duplicate original warrants issued for his arrest, and duplicate original returns thereto are attached to this application.

I am, sir,

Yours very respectfully,

THOMAS CARMODY,

Attorney General of the State of New York.

THE CITY OF NEW YORK, October 23rd, 1913.

(Indictment.)

SUPREME COURT, NEW YORK COUNTY.

THE PEOPLE OF THE STATE OF NEW YORK

against

HARRY K. THAW
RICHARD J. BUTLER
EUGENE DUFFY
MICHAEL O'KEEFE
THOMAS FLOOD

AND

ROGER THOMPSON

The Grand Jury of the County of New York, by this indictment, accuse Harry K. Thaw, Richard J. Butler, Eugene Duffy, Michael O'Keefe, Thomas Flood and Roger Thompson of the Crime of Conspiracy, committed as follows:—

Heretofore, to wit, on the first day of February, in the year of our Lord one thousand nine hundred and eight, at a trial term, Part One of the Supreme Court of the State of New York, in the County of New York, in the First Judicial District, held for the trial of criminal actions, there was duly made and entered by the Honorable Victor J. Dowling, a Justice of the said Court, a certain order which was then and there as follows, to wit:—

> At a Trial Term, Part 1, of the Supreme Court of New York, holden in and for the County of New York, in the First Judicial District of said State, for the trial of Criminal Actions, at the Building for Criminal Courts in said County, on Saturday, the first day of February, in the year of our Lord one thousand nine hundred and eight.
>
> I certify that this copy is correct William N. Penney Assistant Special Deputy to the Clerk of the County of New York.

Present:

The Hon. VICTOR J. DOWLING,
Justice of the Supreme Court of the State of New York.

THE PEOPLE OF THE STATE OF NEW YORK
against
HARRY K. THAW

The defendant on his trial in said indictment having been acquitted by the jury on the ground of insanity, and the Court being certified of the fact, and the defendant being in custody, and the Court deeming his discharge at this time dangerous to public safety, it is

ORDERED that said Harry K. Thaw be detained in safe custody and be sent to the Matteawan State Hospital there to be kept in said hospital until thence discharged by due course of law.

IT IS FURTHER ORDERED that the Sheriff of the County of New York do forthwith convey said Harry K. Thaw to said Hospital.

Enter,

VICTOR J. DOWLING,

Justice of the Supreme Court of the State of New York.

And thereupon the said Harry K. Thaw, pursuant to the terms of the said order, was sent to the said Matteawan State Hospital and confined therein, the said hospital being a hospital duly established by and under the laws of the State of New York to be used for the purpose of holding in custody and caring for such insane persons as might be committed thereto by courts of jurisdiction of the said State, and situated in the County of Dutchess, in the said State;

And afterwards, to wit, on or about the fourteenth day of August, in the year of our Lord one thousand nine hundred thirteen, but on what particular day the Grand Jury is unable more particularly to set forth, the said Harry K. Thaw being then and there so in confinement in the said Matteawan State Hospital as aforesaid, the said Harry K. Thaw, Richard J. Butler, Eugene Duffy, Michael O'Keefe, Thomas Flood and Roger Thompson, well knowing the premises, at the Borough of Manhattan of the City of New York, in the County of New York aforesaid, did unlawfully, fraudulently and maliciously conspire, combine, confederate and agree together between and among themselves and with divers other evil disposed persons to the Grand Jury aforesaid as yet unknown, illegally and fraudulently to cause and procure the said Harry K. Thaw to escape from the said hospital and illegally to go at large, by such dishonest, corrupt, fraudulent, deceitful and illegal means, methods, devices and practices as they should thereafter deem available, to the great and manifest perversion and obstruction of justice and of the due administration of the laws;

And the said Richard J. Butler and Michael O'Keefe, in pursuance and furtherance of and according to the said conspiracy, combination, confederacy and agreement as aforesaid and to effect the purposes thereof, afterwards, to wit, on the

said fourteenth day of August, in the said year 1913, at the Borough of Manhattan of the City of New York, in the County of New York aforesaid, did hire and procure from one John Collins a certain automobile;

And the said Richard J. Butler, Michael O'Keefe and Roger Thompson, in the further pursuance and furtherance of and according to the said conspiracy, combination, confederacy and agreement, and to effect the purposes thereof, afterwards, to wit, on the said fourteenth day of August, in the said year one thousand nine hundred thirteen, did drive the said automobile to the City of Beacon in the said County of Dutchess, in which said city the said Matteawan State Hospital was situated;

And the said Richard J. Butler, Eugene Duffy, Michael O'Keefe, Thomas Flood, and Roger Thompson, in the further pursuance and furtherance of, and according to the said conspiracy, combination, confederacy and agreement, and to effect the purposes thereof, afterwards, to wit, on the seventeenth day of August, in the said year one thousand nine hundred thirteen, did drive the said automobile to the said Matteawan State Hospital and did there await the said Harry K. Thaw;

And the said Harry K. Thaw, in the further pursuance and furtherance of and according to the said conspiracy, combination, confederacy and agreement as aforesaid and to effect the purposes thereof, afterwards, to wit, on the said seventeenth day of August, in the said year, at the said County of Dutchess did illegally leave and escape from the said Matteawan State Hospital and did enter the said automobile and did therein leave the said County of Dutchess and the said State of New York;

And the said Richard J. Butler, Eugene Duffy, Michael O'Keefe, Thomas Flood and Roger Thompson, in the further pursuance and furtherance of and according to the said conspiracy, combination, confederacy and agreement as aforesaid and to effect the purposes thereof, did thereupon take carry and accompany the said Harry K. Thaw in the said automobile from and out of the said County of Dutchess and from and out of the State of New York, against the form of the statute in

such case made and provided, and against the peace of the People of the State of New York and their dignity.

THOMAS CARMODY,
Attorney General of the State of New York.

This copy of indictment correct William N. Penney Assistant Special Deputy to the Clerk of the County of New York.

Witnesses:

DR. RAYMOND F. C. KIEB
JOHN COLLINS
RICHARD R. FOX
WM. GORDON
LINDLEY CHURCHWELL
JAMES R. MURRAY
JAMES HICKEY
THOMAS MOLLOY
ANNIE MAHER
JAS. F. MAHER
LEROY J. CRUM
ROBT. LOWERY
CHAS. SWANSON
WM. TRAVERS JEROME
GEO. S. TURNER
CHAS. B. PECK
JN. B. HANKINSON

SUPREME COURT
COUNSEL I B
Filed 23d day of October, 1913.
Pleads

THE PEOPLE
vs.

HARRY K. THAW	N.A.	
RICHARD J. BUTLER	N.A.	
EUGENE DUFFY	N.A.	
MICHAEL O'KEEFE	N.A.	*Conspiracy.*
THOMAS FLOOD	N.A.	
AND		
ROGER THOMPSON	N.A.	

THOMAS CARMODY,
Attorney General.

A true bill

G. H. PUTNAM,
Foreman.

STATE OF NEW YORK
COUNTY OF NEW YORK } ss:

I, WILLIAM F. SCHNEIDER, Clerk of the said County and Clerk of the Supreme Court of said State for said County, Do CERTIFY, That I have compared the preceding with the original certificate of

Record

on file in my office, and that the same is a correct transcript therefrom, and of the whole of such original.

Indorsed. Filed Oct. 23, 1913.

[SEAL.] In witness whereof, I have hereunto subscribed my name and affixed my official seal, this 23d day of Oct., 1913.

WM. F. SCHNEIDER.
Clerk.

(*Warrant to Arrest.*)

SUPREME COURT, PART ONE,
CRIMINAL TRIAL TERM.

COUNTY OF NEW YORK, ss.

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK,
TO ANY PEACE OFFICER IN THIS STATE

[SEAL.] An indictment having been found on the 23d day of October 1913, in the Court of General Sessions of the Peace of the County of New York, charging Harry K. Thaw with the crime of conspiracy.

You are therefore commanded forthwith to arrest the above named Harry K. Thaw and bring him before the Supreme Court in the County of New York, to answer the indictment; or if the court have adjourned for the term, that you deliver him into the custody of the Keeper of the City Prison of the City of New York, in the Borough of Manhattan of the said City; or if he require it, that you take him before any magistrate in that county, or in the county in which you arrest him, that he may give bail to answer the indictment.

Dated at the Borough of Manhattan in the City of New York, the 23d day of October, 1913.

By order of the Court,
WILLIAM F. SCHNEIDER, *Clerk.*

SUPREME COURT,

PART 1 CRIMINAL TRIAL TERM.

COUNTY OF NEW YORK.

THE PEOPLE OF THE STATE OF NEW YORK
against
HARRY K. THAW

——CH WARRANT FOR MISDEMEANOR.
——ed October 23, 1910

The defendant is to be admitted to bail in the sum of ——— dollars.

(*Officer's Return.*)

TO THE SUPREME COURT }
COUNTY OF NEW YORK } ss:

The return of Edward F. Rayens, a detective of the Police Force of the City of New York, respectfully shows to the Court that the within named Harry K. Thaw can not with due diligence be found within the State of New York.

Dated at the City and County of New York this twenty-third day of October, 1913.

EDWARD F. RAYENS,
Detective.

(Affidavit of Raymond F. C. Kieb.)

UNITED STATES OF AMERICA
STATE OF NEW YORK
In the Matter of
Harry K. Thaw
A Fugitive from the Justice of
the State of New York.

Affidavit as
to Flight, etc.

COUNTY OF NEW YORK
BOROUGH OF MANHATTAN
OF THE CITY OF NEW YORK } ss:

RAYMOND F. C. KIEB, being duly sworn, deposes and says: I am the principal complaining witness against the above named Harry K. Thaw who is charged with having on or about the fourteenth day of August, in the year one thousand nine hundred and thirteen, at the Borough of Manhattan of the City of New York, in the County and State of New York, conspired with one Richard J. Butler, one Eugene Duffy, one Michael O'Keefe, one Thomas Flood and one Roger Thompson, to cause and procure him, the said Harry K. Thaw, illegally and fraudulently to escape from the Matteawan State Hospital where he was then confined, and pursuant to such conspiracy having thereafter committed various overt acts among which was his illegally escaping from the said hospital on August seventeenth, in the said year.

The said Harry K. Thaw was actually in the said State on the day of the commission of the said crime and was seen there on the fourteenth, fifteenth and sixteenth days of August, in the said year, by me.

After the commission of the said crime, to wit, on or about the seventeenth day of August, 1913, for the purpose of avoiding prosecution for the said crime, the said Harry K. Thaw fled from the justice of this state, and is now in the City of Concord, in the State of New Hampshire, a fugitive from justice, as I have reason to believe, for the following reasons, to wit: I am informed by the Sheriff of Dutchess County that the said Harry K. Thaw has been arrested and is now in custody at the

said City of Concord, in the said State of New Hampshire, in proceedings instituted for his extradition as a fugitive from the justice of this state.

This application is made in good faith, for the sole purpose of punishing the accused, and it is not intended or desired to use the prosecution or to obtain the requisition for the purpose of collecting a debt or for any private purpose whatever, and if the requisition be issued the prosecution shall not be used directly or indirectly for any of the said purposes.

The said Harry K. Thaw is about forty-two years of age, and has no occupation, and is a resident of this state, his home being at the Matteawan State Hospital, in the City of Beacon, in Dutchess County, in the State of New York, where he has lived for five years, as I am informed and verily believe.

RAYMOND F. C. KIEB.

Sworn to before me this 23d day of October, 1913.

L. HARDING ROGERS, JR.
Notary Public,
County of New York.

STATE OF NEW YORK
COUNTY OF NEW YORK No. 32094

I, WILLIAM F. SCHNEIDER, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, Do HEREBY CERTIFY, that L. Harding Rogers, Jr., before whom the annexed deposition was taken, was, at the time of taking the same, a Notary Public of New York, dwelling in said County, duly appointed and sworn, and authorized to administer oaths to be used in any Court in said State, and for general purposes: that I am well acquainted with the handwriting of said Notary, and that his signature thereto is genuine, as I verily believe.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the said Court and County, this 23d day of October, 1913.

W. F. SCHNEIDER,
Clerk.

STATE OF NEW YORK

In the Matter
of
HARRY K. THAW
A Fugitive from the Justice of the
State of New York.

Application for Requisition,
THOMAS CARMODY,
Attorney General.
State of New York
to
The Governor of the
State of New York.

(*Authorization to Fred C. Hornbeck.*)

STATE OF NEW YORK.

EXECUTIVE CHAMBER.

THE GOVERNOR OF THE STATE OF NEW YORK
TO ALL TO WHOM THESE PRESENTS SHALL COME.

Know Ye, That I have authorized and empowered, and by these Presents do authorize and empower

FRED C. HORNBECK

who is a public officer, to wit: Sheriff of Dutchess County to take and receive from the proper authorities of the State of New Hampshire

HARRY K. THAW

a fugitive from justice, and convey him to the State of New York, there to be dealt with according to Law.

IN WITNESS WHEREOF, I have hereunto signed my name and affixed the Privy Seal of the State, at the Capitol in the City of Albany, this Sixth day of November in the year of our Lord one thousand nine hundred and thirteen.

[SEAL.]

By the Governor: MARTIN H. GLYNN.

FRANK A. TIERNEY,
Secretary to the Governor.

(Decision of Hon. S. D. Felker, Governor of New Hampshire.)

In the matter of the application for the extradition of Harry K. Thaw, at present within the State of New Hampshire, and an alleged fugitive from justice in the State of New York:

The Sovereign State of New York, by its Governor, has demanded of the proper authority of this State, the interstate rendition of Mr. Harry K. Thaw. A proper respect for the public interest manifested therein demands that I should state the views which form the basis of my decision.

By the petition of Governor Glynn, and the accompanying papers, it appears that the grand inquest for the County of New York has duly returned into open court, an indictment against Mr. Thaw. That is sufficient to warrant the arrest, arraignment and trial of the respondent, if he may be found within the State wherein the indictment is pending. It is, furthermore, sufficient to establish that Mr. Thaw is,—if found in any other state or country while such indictment is pending,—a fugitive from justice.

The provisions of the Federal Constitution, and the Acts of Congress enacted to give force and effect thereto, as construed by the Court of last resort upon such matters, limit me to the consideration of the questions (1) whether the person demanded has been substantially charged with crime; and (2) whether he is a fugitive from justice. Such was the decision of the Supreme Court of the United States in the most recent case wherein a sister state demanded of New Hampshire the interstate rendition of a person within her borders. *Munsey* v. *Clough*, 196 U. S. 372 decided in 1905. In that case it was declared, by a unanimous court: "The proceedings in matters of this kind before the Governor are summary in their nature. . . . The person demanded has no constitutional right to be heard before the Governor on either question, and the statute provides for none. To hold otherwise would, in many cases, render the constitutional provision, as well as the statute passed to carry it out, wholly useless." I have, nevertheless, owing to the urgency of the demands of his counsel,—men in whose integrity I have

confidence, and for whose opinions I entertain deep respect,—given Mr. Thaw the fullest possible opportunity for the expression of their views. With profound respect therefor, I am unable to view my duty in the premises, as including an investigation of Mr. Thaw's mental condition, or of the conduct of the counsel for the State of New York, or of the probable guilt or innocence of the accused. To do so would hardly be consistent with the mandatory provision of the constitution that a person charged in any state with treason, felony or other crime, who shall be found in another state, "*shall, on demand of the executive authority of the state from which he fled, be delivered up.*" It would, furthermore, involve an attempted supervision, by myself, over procedure of courts of criminal jurisdiction of another state, in a manner entirely beyond the power of such state to control. Such a course would, likewise, involve an inquiry into the motives of the authorities of the demanding State in making the request. Any one of these would manifestly lead to the virtual suspension and eventual nullification of the provisions of the Federal constitution, by States otherwise supposed to be subject thereto. I have, and I shall continue to assume that the course of the State of New York, in its present demand, does, and its subsequent conduct with reference to the arraignment and trial of the respondent, upon the indictment for which alone the extradition sought is hereby granted, will demonstrate her full appreciation of the dictates of fair play and a righteous and equal administration of justice.

By the rules of practice in extradition cases, prepared by the Interstate Extradition Conference held in the City of New York in 1887, and recommended to and adopted by the States, and which have been in force ever since, any and all rights of persons who may be taken into custody for purposes of extradition are preserved to their fullest measure, by a proviso whereby the officer taking the respondent into custody, is commanded to afford the prisoner "such opportunity to sue out a writ of *habeas corpus*, as is prescribed by the laws of this state or by the federal law." Such procedure affords Mr. Thaw an ample remedy, before a tribunal having jurisdiction of such extraordinary

remedies with the power to issue final process for carrying its judgments into effect.

I have been aided in my deliberations, by the advice of the Attorney General, which as last given me, is contained in the following letter:

"CONCORD, Nov. 6, 1913.

Hon. SAMUEL D. FELKER,

Governor of New Hampshire,
Concord, New Hampshire.

MY DEAR GOVERNOR:—

In reply to your request of the 5th inst., for a statement of my views as to the legal status of the requisition upon your Excellency, issued by the Governor of the State of New York for the extradition of one Harry K. Thaw who stands charged by indictment with the crime of conspiracy committed in the State of New York on or about the 14th day of August, 1913,—permit me to say that upon a review of the record the following facts appear:—

1. That a duly accredited requisition has been issued by the Governor of the State of New York and has been duly presented to your Excellency for executive action in New Hampshire.

2. That the crime charged in the accompanying indictment is a violation of Section 580, Art. 50, Volume IV of the Consolidated Laws of the State of New York, punishable under Section 1937 of the same laws by imprisonment in a penitentiary or county jail for not more than one year, or by a fine of not more than five hundred dollars, or by both.

3. That since the commission of the crime in question the respondent has made an escape from the State of New York and is now held in custody by the sheriff of our County of Coös upon the charge of being a fugitive from justice.

No facts have been proven that in any way controvert or qualify the fundamental grounds upon which the Executive of one Sovereign State is imperatively bound to honor the requisition of another Soverign State for the due surrender and delivery to its designated agent of a fugitive charged with a punishable crime under the laws of the demanding state.

As the elementary and essential requisites of a legal requisition have been duly presented, under the Constitution

and laws of the United States and the established rules of procedure of the several States under a long line of recognized decisions, this requisition thus becomes a mandatory precept upon the Executive within whose borders the fugitive is found and taken into custody. Arguments and briefs both for and against the granting of the executive warrant have been considered. They present the result of most profound learning, commanding ability and extended research, but they do not change the primary facts upon which executive action should be based. If outside the legal limits of the executive forum certain suggested facts and circumstances, not properly addressed to it, exist, which may later operate in the fugitive's favor, it is his undoubted right to have them considered in a judicial forum, but this possible presentment does not create a warrant for the Executive to anticipate the result of a judicial review. The long-established and well-recognized rules of procedure in extradition cases admit of but one conclusion in the present case, and that conclusion is that the executive order should issue by your Excellency for the due surrender of the fugitive to the accredited agent of the State of New York. If New York later departs from the established and civilized standard of action, she alone will be responsible to her citizens and to the world. If New Hampshire now departs from the established and civilized standard of action she, also, will alone be responsible to her citizens and to the world.

No ultimate prejudice or harm can come from following with fidelity the ancient injunction to 'Let all things be done decently and in order.' Applying and following this fundamental rule of constitutional governments and of intelligent men, the duly supported requisition of the Sovereign State of New York for the due rendition of the fugitive in question should be duly honored by the Executive of the Sovereign State of New Hampshire. By this course any possibility of ultimate error is excluded, and all constitutional rights of the individual, and all constitutional obligations of the State, will each and all be strictly observed and maintained.

Respectfully submitted,

(Signed) JAMES P. TUTTLE,

Attorney General."

GOVERNOR FELKER'S
Decision on
Extradition of
H. K. THAW,
Delivered Nov. 8, 1913

(*Warrant of Extradition.*)

(Copy)

STATE OF NEW HAMPSHIRE.

THE GOVERNOR OF THE STATE OF NEW HAMPSHIRE
TO HOLMAN A. DREW

And the Sheriffs, under Sheriffs, and other officers of and in the several Cities and Counties of this State.

[SEAL.]

SAMUEL D. FELKER

WHEREAS, It has been represented to me by the Governor of the State of New York that HARRY K. THAW

stands charged with the crime of conspiracy which he certifies to be a crime under the laws of said State committed in the County of New York in said State, and that he has fled from justice in said State and has taken refuge in the State of New Hampshire, and the said Governor of New York having, in pursuance of the Constitution and Laws of the United States, demanded of me that I shall cause the said HARRY K. THAW to be arrested and delivered to FRED C. HORNBECK who is duly authorized to receive him into his custody and convey him back to the said State of New York

AND WHEREAS, The said representation and demand is accompanied by copy of indictment whereby the said HARRY K. THAW is shown to have been duly charged with the said crime and with having fled from said State and taken refuge in the State of New Hampshire, which is duly certified by the said Governor of the State of New York to be authentic and duly authenticated;

THEREFORE, You are required to arrest and secure the said HARRY K. THAW wherever he may be found within the State and afford him such opportunity to sue out a writ of habeas corpus as is prescribed by the laws of this State, and to thereafter deliver him into the custody of the said FRED C. HORNBECK to be taken back to the said State of New York from which he fled, pursuant to the said requisition; and also to return this warrant and make return to the Governor of New Hampshire, within thirty days from the date hereof, of all your proceedings

had thereunder and of all facts and circumstances relating thereto.

GIVEN UNDER MY HAND and the seal of the State, at the Capitol, in Concord, this eighth day of November in the year of our Lord one thousand nine hundred and thirteen.

By the Governor:

(Signed) EDWARD N. PEARSON,
Secretary of State.

(Authorization to Fred C. Hornbeck.)

STATE OF NEW YORK.

EXECUTIVE CHAMBER.

THE GOVERNOR OF THE STATE OF NEW YORK
TO ALL TO WHOM THESE PRESENTS SHALL COME.

Know Ye, That I have authorized and empowered, and by these Presents do authorize and empower

FRED C. HORNBECK

who is a public officer, to wit: Sheriff of Dutchess County to take and receive from the proper authorities of the State of New Hampshire, HARRY K. THAW, a fugitive from justice, and convey him to the State of New York, there to be dealt with according to Law.

IN WITNESS WHEREOF, I have hereunto signed my name and affixed the Privy Seal of the State, at the Capitol in the City of Albany, this sixth day of November in the year of our Lord one thousand nine hundred and thirteen.

[SEAL.]

By the Governor: MARTIN H. GLYNN.

FRANK A. TIERNEY,
Secretary to the Governor.

(*Governor's Certificate.*)

I, SAMUEL D. FELKER, DO HEREBY CERTIFY that I have this eighth day of November 1913, honored the requisition of the Governor of New York for the surrender of HARRY K. THAW, a fugitive from the justice of the said last-named State, and have issued a warrant for his delivery to FRED C. HORNBECK the agent of said Governor of the State of New York whose authority to receive said fugitive is annexed hereto.

IN WITNESS WHEREOF, I have hereunto signed my name and affixed the seal of the State at the Capitol in the city of Concord this eighth day of November in the year of our Lord one thousand nine hundred and thirteen.

[SEAL.]

SAMUEL D. FELKER,
Governor.

SUPPLEMENTAL WRIT OF HABEAS CORPUS.

[Issued November 18, 1913.]

UNITED STATES OF AMERICA.

To HOLMAN A. DREW, *Sheriff of Coös County, State of New Hampshire, and* "JOHN DOE", *the name* "JOHN DOE" *being fictitious and being used to designate an agent, deputy, aid or assistant of the said* HOLMAN A. DREW, *Sheriff of Coös County aforesaid, or other person, having in custody one Harry Kendall Thaw, the real name of said persons being unknown to the petitioner,* GREETING:

WE COMMAND YOU that you have the body of Harry Kendall Thaw by you imprisoned and detained, together with the time and cause of such imprisonment and detention, by whatever name said Harry Kendall Thaw shall be called or charged, before the Honorable Edgar Aldrich, United States District Judge for the District of New Hampshire, on the eighteenth day of November, A. D., 1913, at 4 o'clock in the afternoon of that

day, in the United States Court House in the City of Concord, in the District of New Hampshire aforesaid, to do and receive what shall then and there be considered concerning said Harry Kendall Thaw, and have you then and there this writ.

WITNESS Honorable Edgar Aldrich, United States District Judge for the District of New Hampshire, at Concord, in said District, this 18th day of November, 1913.

[SEAL.]

BURNS P. HODGMAN,
Clerk U. S. District Court.

[*Marshal's Return.*]

UNITED STATES OF AMERICA,
DISTRICT OF NEW HAMPSHIRE, ss.

CONCORD, N. H., November 18, 1913.

PURSUANT HEREUNTO, I have this day served the within writ of habeas corpus upon Holman A. Drew, Sheriff of Coös County, who has the custody of the within named Harry K. Thaw by giving to him in hand a copy of said writ attested as true and correct by Burns P. Hodgman, Clerk of the U. S. District Court for the District of New Hampshire.

E. P. NUTE,
U. S. Marshal.

FEES.

Service	$2.00
Travel	.06
	$2.06

ORDER OF COURT AS TO CUSTODY.

[November 18, 1913.]

ALDRICH, J. Proceedings under the habeas corpus writ of September 13, 1913, having been temporarily suspended; the petitioner having been released from custody thereunder; and having been taken into the custody of the state authorities

under an executive warrant; and having, upon proper proceedings, been produced again before me in open court, it is ordered:

That for the time being, and until further order, he remain in the custody of E. P. Nute and Holman A. Drew as keepers acting under Federal authority.

By the Court,

BURNS P. HODGMAN,
Clerk.

RETURN TO THE WRIT OF HABEAS CORPUS.

[Filed November 22, 1913.]

TO THE DISTRICT COURT OF THE UNITED STATES OF AMERICA, FOR THE DISTRICT OF NEW HAMPSHIRE:

To the writ of habeas corpus heretofore herein allowed and served upon me upon the 18th day of November, 1913, I, HOLMAN A. DREW, Sheriff of Coös County, State of New Hampshire, hereby respectfully make return as follows, that is to say:

FIRST: At the time of the service upon me of the said writ of habeas corpus, the body of the relator herein, Henry Kendall Thaw, was in my custody under and by virtue of a certain warrant of the Governor of the State of New Hampshire, one of the United States of America, a copy of which said warrant is hereunto annexed, is marked "Exhibit A" and is intended to be taken as a part of this return.

SECOND: Upon the service upon me of said writ of habeas corpus E. P. Nute, United States Marshal for the District of New Hampshire, by order of this Honorable Court took from me, as sheriff aforesaid, the custody and control of the body of said Henry Kendall Thaw to be held subject to any order in respect to its custody which this Honorable Court might make pending a hearing and decision upon said writ of habeas corpus.

THIRD: That thereafter this Honorable Court made an order directing that pending a hearing and decision upon the said writ of habeas corpus that the body of said Henry Kendall Thaw be and the same was committed to the care and custody of Holman

. Drew and E. P. Nute as Keepers subject to the jurisdiction nd control of this Honorable Court.

FOURTH: That as Sheriff of Coös County, State of New Hampire, I am unable to produce in obedience to the writ of habeas orpus herein the body of Henry Kendall Thaw for the reasons bove set forth, the body of the said Henry Kendall Thaw ow being in the custody of and subject to the jurisdiction and ontrol of this Honorable Court.

FIFTH: That your respondent is advised by counsel learned n the law and believes that his former custody, in his capacity f Sheriff of Coös County, State of New Hampshire, of the body f said Henry Kendall Thaw, under and by virtue of the said arrant of the Governor of the State of New Hampshire was a gal and proper custody and that in law he is entitled to have uch custody restored by this Honorable Court to the end that e may fully execute said warrant according to the tenor hereof.

SIXTH: That your respondent respectfully prays that the rit of habeas corpus herein be dismissed and that this Honorble Court make an order directing the delivery of the body of aid Henry Kendall Thaw to this respondent as Sheriff of Coös ounty, State of New Hampshire, to the end that this respondnt may fully execute said warrant according to the tenor thereof.

SEVENTH: That your respondent now is, and, at all times nentioned herein, was sheriff of Coös County, State of New Hampshire.

Dated: CONCORD, NEW HAMPSHIRE,
November 22nd, 1913.

HOLMAN A. DREW,
Sheriff of Coös County, State of New Hampshire.

STATE OF NEW HAMPSHIRE, } ss. November 22, 1913.
COUNTY OF MERRIMACK, }

Personally appeared the above named HOLMAN A. DREW, and made oath that the foregoing by him subscribed, was true.

Before me,

BERNARD JACOBS,
Justice of the Peace.

EXHIBIT A

(*Copy*)

STATE OF NEW HAMPSHIRE.

THE GOVERNOR OF THE STATE OF NEW HAMPSHIRE. To HOLMAN A. DREW And the Sheriffs, under Sheriffs, and other officers of and in the several Cities and Counties of this State.

[SEAL.]

WHEREAS, It has been represented to me by the Governor of the State of New York that HARRY K. THAW SAMUEL D. FELKER stands charged with the crime of conspiracy which he certifies to be a crime under the laws of said State committed in the County of New York in said State, and that he has fled from justice in said State and has taken refuge in the State of New Hampshire, and the said Governor of New York having, in pursuance of the Constitution and Laws of the United States, demanded of me that I shall cause the said HARRY K. THAW to be arrested and delivered to FRED C. HORNBECK who is duly authorized to receive him into his custody and convey him back to the said State of New York

AND WHEREAS, The said representation and demand is accompanied by copy of indictment whereby the said HARRY K. THAW is shown to have been duly charged with the said crime and with having fled from said State and taken refuge in the State of New Hampshire, which is duly certified by the said Governor of the State of New York to be authentic and duly authenticated:

THEREFORE, You are required to arrest and secure the said HARRY K. THAW wherever he may be found within the State and afford him such opportunity to sue out a writ of habeas corpus as is prescribed by the laws of this State, and to thereafter deliver him into the custody of the said FRED C. HORNBECK to be taken back to the said State of New York from which he fled, pursuant to the said requisition; and also to return this warrant and make return to the Governor of New Hampshire, within thirty days from the date hereof, of all your proceedings

d thereunder and of all facts and circumstances relating ereto.

GIVEN UNDER MY HAND and the seal of the State, at the Capi-l, in Concord, this eighth day of November in the year of r Lord one thousand nine hundred and thirteen. By the overnor:

(Signed) EDWARD N. PEARSON,
Secretary of State.

NSWER TO RETURN TO WRIT OF HABEAS CORPUS.

[Filed November 28, 1913.]

THE DISTRICT COURT OF THE UNITED STATES OF AMERICA FOR THE DISTRICT OF NEW HAMPSHIRE:

Now comes HENRY KENDALL THAW and in answer to the urn to the writ of habeas corpus made by Holman A. Drew, eriff of Coös County, State of New Hampshire, to the Sup-mental writ of habeas corpus sued out by your petitioner this Honorable Court and served on the said Drew on the h day of November, 1913, says:

FIRST: That, as he is informed and believes, the facts and egations set forth in the First, Second, Third, Fourth and enth paragraphs of said Answer are true.

SECOND: That he denies the allegations in the Fifth paragraph said Answer, and says that said custody under said warrant said Governor of said State of New Hampshire, was not legal l proper, and that said Drew is not entitled to have said tody restored by this Honorable Court, and for his reasons l grounds therefor, he respectfully refers this Honorable urt to the several reasons and grounds set forth in his Sup-mental petition for a writ of habeas corpus, filed in this rt on the 18th day of November, 1913.

THIRD: And your petitioner further says, that said Drew ot legally entitled to have said custody restored by this norable Court, because the alleged New York custody, to ch reference is made in the demand or application for ex-dition and the accompanying papers and from which his

escape is alleged, was not founded on due process of law, because the process of commitment was not only not based upon any trial or judgment under any issue of present sanity or insanity, or, in other words, of sanity or insanity at the time of commitment; and also, because the statute under which such commitment was made did not, and does not now, afford due and adequate remedies and opportunities for relief from illegal and oppressive custody, and for that reason, as well as for others, the New York statute is unconstitutional and the process founded thereon, without trial and proper findings, was not and is not due process within the meaning of the Federal constitution, and said custody is illegal and oppressive because it is not only based upon an unconstitutional statute and an order of commitment without trial, but because, in effect, it is worse than sentence to penal servitude, in that it excludes all idea of executive clemency and pardon.

WHEREFORE, your petitioner respectfully prays that the writ of habeas corpus be sustained and that this Honorable Court will refuse to deliver the body of your petitioner to the said Holman A. Drew and that he may be discharged.

HENRY KENDALL THAW,
Petitioner.

Dated at Concord, N. H., this
28th day of November, 1913.

STATE OF NEW HAMPSHIRE
COUNTY OF MERRIMACK. } ss.

November 28th, 1913, personally appeared the above named Henry Kendall Thaw and made oath that the foregoing by him subscribed is true, before me

MERRILL SHURTLEFF,
Justice of the Peace.

APPLICATION FOR BAIL.

[Filed December 6, 1913.]

To the District Court of the United States of America, for the District of New Hampshire:

Your petitioner, Henry Kendall Thaw, respectfully represents that he is now being held in the joint custody of E. P. Xute, United States Marshal for the District of New Hampshire, and Holman A. Drew, Sheriff of Coös County, who were appointed by this Honorable Court as his keepers pending the decision on a writ of Habeas Corpus which he sued out in this Honorable Court on the 13th day of September, 1913; and he respectfully prays that he now be admitted to bail for the following reasons:—

First. That the offence for which the State of New York has alleged to indict your petitioner is a misdemeanor, to wit: the crime of conspiracy, which, under Section 580 of the Penal Law of the State of New York, is defined as follows:—

"If two or more persons conspire, 1, To commit a crime, or . . . 6, To commit any act . . . for the perversion or obstruction of justice or of the due administration of the laws, each of them is guilty of a misdemeanor."

Second. That said offence is punishable by imprisonment in a penitentiary or County jail for not more than one year or by a fine of not more than Five Hundred Dollars or by both. (Sec. 1937 of the Penal Law of the State of New York.)

Third. That Sec. 553 of said Penal Law provides: "If the charge be for any other crime, he may be admitted to bail, before conviction, as follows:

1. As a matter of right, in cases of misdemeanor; . . .

Fourth. That all of the persons who were indicted for the alleged conspiracy with your petitioner, who have appeared before the court in the State of New York have been admitted to bail and are now at liberty under bail.

Fifth. That your petitioner has been for a long time and now is under great expense for the payment of his keepers and their board.

SIXTH. That your petitioner has been in custody since September 10th, 1913, and it is probable that the proceedings now pending in this Honorable Court cannot be finally determined for several months.

Dated at Concord, N. H., this 6th day of December, 1913.

HENRY KENDALL THAW.

By WM. M. CHASE,
MARTIN, HOWE & DONIGAN,
DREW, SHURTLEFF, MORRIS & OAKES,
His Attorneys.

RECORD OF PROCEEDINGS AT CONCORD DECEMBER 9, 1913, AT HEARING ON APPLICATION FOR BAIL.

MERRILL SHURTLEFF. May it please the Court: In the matter of Harry Kendall Thaw, we have filed an application for bail, and I will read the application:

(*Reads.*)

THE COURT. Is there any objection to this?

WILLIAM TRAVERS JEROME. Very radical, if your Honor wants to turn this homicidal lunatic loose on this community, which your Honor has the power to do, but it would hardly be considered a wise execution of that power. I cannot quite understand the attitude of counsel in this case. I do not mean to criticise them personally, but I mean intellectual attitude in coming before this honorable court, fighting the question of extradition on the ground that this man is presumptively a lunatic and yet asking your Honor to treat him as presumptively a lunatic. They now come before you asking that you turn this presumptive lunatic loose in New Hampshire or wherever he desires to go.

It might be interesting to read to your Honor the opinion of Dr. Britton D. Evans, a physician retained by Thaw immediately upon the killing of White, who carefully investigated his family history, who had unlimited opportunity to deal with Thaw personally and who testified upon two of his trials, upon

two habeas corpus proceedings, and only ceased testifying as to his mental state when the report I now hold in my hand got into my possession, but he had certainly ample opportunity of ascertaining this man's mental condition, and he is at the head of an institution in the state of New Jersey, at Morris Plains, in which there are about 1,500 or more insane persons. Speaking of Thaw in this report, he says:

MR. SHURTLEFF. What time was this report made?

MR. JEROME. This report was made before Thaw's trial. It was made in 1906 to Thaw's counsel. The way it came into my possession is that it was filed as an exhibit in the suit in the federal court against Mrs. Thaw, and forms quite interesting reading.

THE COURT. What is that, Mr. Jerome?

MR. JEROME. This is the report of Dr. Britton D. Evans, an alienist employed by the Thaw family, who testified on two writs of habeas corpus and two trials for homicide in regard to Thaw, and it is an expression of Dr. Britton D. Evans' opinion as to the mental state of Thaw, the form of insanity he is suffering from, and as I will argue from this and others, the peril that any community is going to be put in in case he is turned loose. However, your Honor would relieve a man from criminal imprisonment by discharging the prisoner from the prison if he was insane or if he was unlawfully detained and he would put him in some institution.

MR. SHURTLEFF. I would like further to inquire if Dr. Evans' testimony at the subsequent hearings is in accord with the opinion.

MR. JEROME. Dr. Evans said he was afflicted with that form of insanity which has been wittily described as commencing at the time of the homicide and ending at the time of the verdict. His testimony was perfectly consistently taken with that qualification.

MR. SHURTLEFF. Has been in every trial?

MR. JEROME. Perfectly consistent in every trial that he has testified that the man was insane at the time of the murder and perfectly sane at the time of the verdict, but after the development of his report Dr. Evans despaired of being further retained

by Thaw, and is now never called in, outside of his own locality, as an expert.

THE COURT. Let us see whether we better begin at that end of it. Let us see whether this is a bailable case. What do you say, eliminating for the present and the present only, the question of sanity?

MR. JEROME. The practice in this matter, I do not know of any precedent that would guide your Honor. I should say that pending a writ of habeas corpus, a court that has power to issue a writ of habeas corpus has a right to put the prisoner before him on habeas corpus, pending the decision, in any custody in which the court sees fit. That is my understanding of the power of courts which have the right to issue these writs.

THE COURT. You would concede, if the situaton here was to be divorced entirely from the element of sanity or insanity, that the case is a bailable case?

MR. JEROME. I do not say it is bailable, using that exact word, because bailable has come to have technical associations with a term that is not quite correct. I am of the opinion that your Honor has the power and that any court, in the absence of a statute depriving him of that power, any court of general jurisdiction which has power to issue a writ of habeas corpus, has power to dispose of the body of the prisoner pending a decision upon that writ. It might do anything it please with the body of that prisoner. It is only a question of the wisdom to be exercised in employing that power.

MR. SHURTLEFF. If the court please: I do not now remember the case, but it is within, I should say, four months, that a citizen of the state of New York was bailed in Washington where he was, an attempt was being made to extradite him, and he sued out a writ of habeas corpus. It was the gentleman who appeared before the senate committee, I think, who gave some testimony. I forget his name, but I remember he was bailed pending extradition proceedings.

MR. JACOBS. Wasn't it pending an appeal?

MR. SHURTLEFF. I don't know whether it was pending an appeal or pending a hearing.

THE COURT. I think the Supreme Court has said that

under habeas corpus the party may be held in the hands of keepers or committed to jail or admitted to bail. It is of no consequence as to what it is technically called. I think for the purpose of this discussion it may be assumed that the petitioner here is in a situation to demand bail unless by reason of the history of the case which he presents, there is some element of danger involved; that is what you are about to suggest, Mr. Jerome?

MR. JEROME. For that reason I was going to present to your Honor a slight history of the case as appears by the records in the various proceedings.

THE COURT. I think the general suggestion is entirely pertinent, but whether we better go outside of the record is the query in my mind.

MR. JEROME. The court record is this, that in the year 1908, after a trial—

THE COURT. I mean the record as presented here in the proceedings before me.

MR. JEROME. There is nothing in that record to guide your Honor's discretion. Your Honor will have to seek information from other records. Here there is nothing but the return of the sheriff of Coös County who does not know anything about the mental state of the man. Why won't your Honor let me tell you, as it appears in the records of the highest court, the Supreme Court of the United States, covering a proceeding in which this man was a party; then if in the face of this judgment of the highest jurisdiction in the land, your Honor sees fit, without anything but what the prisoner may himself put in his petition, to reach a different conclusion from that court—

THE COURT. I am not suggesting what the petitioner put in his record here, and I am not suggesting what views are in my mind about it. I am seeking for a pertinent question to discuss. Now, I expect you to aid me in that direction.

MR. JEROME. I think I can.

THE COURT. I assume that you will. Now, whether in a proceeding like this, which is on behalf of the prisoner whose asylum is here in this district for the present and in which he invokes the constitution and in which the sheriff becomes a party and in which the state of New York, I suppose, is the

real party, which makes the answer and perfects the pleadings—now, whether I ought—and I am not in saying this discounting your position at all—whether it is advisable on this hearing to raise an issue of fact which will lead us outside of these papers. Here you have your extradition papers which I have not seen in print yet, which sets out the crime for which you seek to have this petitioner extradited, and you describe it, and in your description you recite certain things that occurred in New York. That is all pertinent, and isn't it enough for your purposes here?

MR. JEROME. Thoroughly pertinent.

THE COURT. If it is open to you to read from Dr. Evans' testimony somewhere in some other proceeding, where is this hearing going to end. It opens the field at once to the other side to go into this question of sanity.

MR. JEROME. I submit the question to your Honor without any discussion.

Your Honor said I might be able to help you in forming the question for discussion. I think I can, because for seven years I have lived pretty nearly day and night with this miserable case. Nothing would be more delightful to the authorities of the state of New York for your Honor to admit this fellow to bail. We know perfectly well that that would terminate the extremely distasteful labors they have been through in the state of New York for a number of years.

MR. SHURTLEFF. I beg your pardon. You mean to insinuate that Mr. Thaw would leave the state?

MR. JEROME. I haven't the shadow of a doubt that a man who is willing to put up $25,000 bribe to the head of the institution in which he was confined, would not be held by a little bail.

THE COURT. I think when Mr. Jerome has the floor and is presenting his case that he should not be interrupted.

MR. SHURTLEFF. I do not like to have him cast his insinuations. He has done enough in this case already—in others; not in this one.

THE COURT. Perhaps if you had not interrupted him he

would not have said what he did. You should make your objections to the court.

MR. JEROME. Permit me to say the way the question before your Honor lies in my mind. If I am in error, then I will take your Honor's decision, availing myself of the privilege of a lawyer of praising or blaming it outside Your Honor having issued the writ of habeas corpus and pending the decision on that writ placed this prisoner or petitioner in the custody of the United States marshal and Holman Drew as keepers before this court, the prisoner now comes to you and says that he is dissatisfied with that particular custody, and he would like to be enlarged in the custody of persons who would give a bond that upon a decision requiring his appearance here he would appear. A situation like that was not contemplated by the petitioner for the writ of habeas corpus, nor by the answer; therefore, one would not expect to find either in the petition for the writ, the return, or the answer information which would be irrelevant to the issues there raised but entirely relevant to the question of how your Honor should exercise your discretion. So if we abide by the pleadings in this case, we abide for information—we abide by papers not designed to give such information because such information would be wholly irrelevant to an issue sought to be raised by that record. They would be impertinent; they could probably be stricken out as redundant and superfluous. So we are dealing here with a different question than the ultimate question of whether this man should be returned to New York on this requisition or not. Your Honor wants something here that will enable you to say, under all the circumstances, would it be a wise and proper thing for me to give this man his liberty on bail.

In the peculiar circumstances of this case, I would suggest that there would be two things which would occur to your Honor's mind. The first: Would he be likely to answer should the decision of this court ultimately be such as to require his presence? The second point is: Irrespective of whether he would answer or not, under such circumstances, is this man of type as shown by the multitudinous litigation proceedings which volumes of evidence as to his mental condition was

taken and which resulted in the decision that he was a dangerous man to be at large; is he a man of the type that it would be safe and proper for the court to enlarge him, so that he may go and come as ever he please, if it be only within the district of New Hampshire?

Those two questions, it seems to me, are the questions which in this matter are before your Honor. Those two questions are purely irrelevant to the record as it stands on the habeas corpus matter, and if we are not to inform your Honor as to the mental state of this man as shown by adjudications to which he was a party, I know of no way in which your Honor can receive the information that will enable you to determine either the first or the second of the questions suggested, unless your Honor is going to take judicial notice without your attention being called to them. I am the last one that would care to go into the question of the insanity. It is a very expensive question. It would take a long time and would result inevitably as it has resulted on four occasions in the past.

The first took seven weeks; the second took four days; the third took six weeks; the fourth took five weeks; spread over a period of eight years.

Your Honor will bear in mind one thing, and perhaps you would bear it in mind, because I find that things that are evidently so familiar to me we often lose our sense of perspective in these matters being so: The validity of the commitment of Thaw to that institution has not only been passed upon by the Court of Appeals of the State of New York in the proceeding to which he was a party and unanimously affirmed, but the writ of error to the Supreme Court of the United States was denied.

THE COURT. Where are those cases?

MR JEROME. That is not reported, as I am not aware that the denials of writs of error by Supreme Court justices are reported.

THE COURT. The Court of Appeals of New York?

MR. JEROME. It is reported under the title of "*The P... on the Relation of Peabody* v. *Chanler*," 133 App. Div ... There was a decision by five judges of the Appellate Divi...

four judges writing to sustain and one dissenting. On appeal to the Court of Appeals, it was affirmed upon the opinion of Jenks and Rich in the court below. To get the line of reasoning of the Court of Appeals, your Honor might see 133 App. Div. 159, and that case is affirmed in 196 N. Y. 525, and the opinions filed by Jenks and Rich go very elaborately into the federal question of due process as contained in the fourteenth amendment to the Constitution of the United States.

THE COURT. That case involved the question of the constitutionality of the New York statute?

MR. JEROME. Yes sir. Then subsequent application was made to Justice McKenna after the affirmant by the Court of Appeals. Application was made to Justice McKenna of the Supreme Court of the United States for the allowance of a writ of error and he refused it. That refusal is not reported because no opinion was filed. He just refused to grant the writ, but if any question is made on that, I can send to Washington and procure a record of it there. It was on the twentieth of August, 1909.

And as to the extraordinary suffering that is imposed upon this man by the way of keeping him in the so-called presidential suite at the Eagle Hotel, the great expense that he is under, the expense can be readily economized by putting him in the lock-up where men of that type usually go. We have been ready since the very first day I appeared before you in Littleton, now three months ago. I was prepared to argue it then. There has been no time since that the state of New York has not been prepared to argue these questions, and I am prepared to argue them now.

On the question of whether he would stay here under any bail, we sent one man to state prison, a lawyer to whom he gave $25,000 to bribe the superintendent of the institution in which he was confined. Now, it would certainly be ridiculous to put a man on bail of $25,000, in a misdemeanor case, and it also would appear without doubt that a man who was willing to give a lawyer $25,000 to bribe the keeper of the institution that he was confined in, he is not going to be held by any lesser bail.

That lawyer has been sentenced to state prison, convicted of crime as a result of his action.

I can show your Honor that four judges of the State of New York have had most elaborate hearings at which this man was represented and in which I say the first occupied seven weeks, the second occupied four days, the third six weeks and the fourth five weeks. I can give you extracts from the testimony of alienists showing you the form of insanity that this man is afflicted with, a form that enables him to know the nature and quality of his acts and what he is doing, making him amenable in every English speaking country to the criminal law, because nothing could be more absurd than the proposition that there is any English speaking country in the world in which an insane man is not responsible to the criminal law and in which the presumption is not that he is responsible. I defy the production of the English colonies in Australia. Where will you go, all over the United States the presumption of the law is the same without exception in any state, and the same thing applies in the federal jurisdiction as shown by the charge of Judge (?) in the Guiteau case. The presumption is that every man, sane or insane, is liable to the criminal law. He is excused in two cases: When the insanity is of such a character that he does not know the nature or quality of his acts; second, in a few of the states and as I understand it in New Hampshire, where the act done is the direct and necessary and inevitable result of this insanity and one not controllable by the insane person. In all other cases the insane man is liable to the criminal law.

The first impression that the case makes on it, your Honor indicated at Littleton, there is a very grave question—deference to your Honor's experience and wisdom. I have devoted a very great deal of time since the day I was before you there until the present time. I can give you my professional word that when you come to consider this case you won't find enough in it to excite even an academic interest, and yet we have strung on here and strung on. The papers are not even printed the record. I will take the papers to New York, and I will print them at the state of New York's expense. I will pay the clerk his full fees for certifying to them just as if they were printed

here, and I will get it done. I would have it done—I would have it back in forty-eight hours if I can take those papers today, with permission to do it, and I will have them back in forty-eight hours. We are ready and willing and anxious. We go to and from, between Canada and Vermont, and this is the seventh time we have been in this state on this matter.

THE COURT. Mr. Jerome, I understand that to be a criticism of the proceeding here.

MR. JEROME. I make no criticism of any proceeding here. I make an offer to—

THE COURT. I merely say, whether you have or not, I understood you to say there was unwarrantable delay.

MR. JEROME. I said if I could have the papers, I would have them printed, and also I will have them back if you will let me take them.

THE COURT. I do not think you quite ought to say that, because you have had in your hands since the last hearing the stenographer's report of the proceedings. You were asked to return them speedily, so that the printing might go on.

MR. JEROME. Do I understand that all the vapid talk of counsel contained here is to be printed as a part of the record? I understood that we were to have the record printed and that when the record was printed we were to submit printed briefs. I did not understand that we were to submit printed briefs of the discussion of counsel in court running over Lord knows—

THE COURT. I don't think you need to go over—

MR. JEROME. Forty pages.

THE COURT. But there is no objection if a party desires to print what is said here during the progress of the proceeding to have it done. When it comes to the question of formulating the questions in this case for the Supreme Court on appeal, why that is another thing. Your suggestion at the last hearing was that the whole record be printed.

MR. JEROME. The record, sir, but I never heard of the talk of counsel in court being a part of a record, even in a wide sense, unless it was made in some way, and there were stipulations or admissions in it which were sought to make it a part of the record to bind counsel. So I meant no criticism at all. I

only meant that I have a very eager desire to end this case before it is turned over to my grandchildren; and seven years is a long while to camp with a case.

Does your Honor desire to hear me on why this man, who is a dangerous man, should not be turned loose in any community?

THE COURT. I will hear you on any question that ought to be considered in connection with this application for bail. I do not think it would be useful to travel too far outside.

MR. JEROME. If your Honor will only give me some intimation. I certainly appeal to your Honor in this way. Nobody has exhibited greater willingness than I have to pursue any course that anybody will indicate. I made four propositions here the last time, and the defendants would not accept them. I offered to do anything that your Honor suggested, but your Honor said it was a serious matter and you would make no suggestion. I then submitted to do anything that the defense suggested and they refused. If your Honor will tell me how I can help you to determine whether this man is liable to come back, if you want to hear me on that question; if your Honor will suggest how to go about it, whether you want to be informed as to his mental condition, so that you may determine whether he is a safe man to roam around at large, I will address your Honor on that subject.

THE COURT. I should, of course, feel bound to protect the community in some way. I should feel bound to do what I thought was reasonable on that question.

MR. JEROME. I will take any suggestion your Honor will make.

THE COURT. I doubt if it is my duty to sit here and listen to expert testimony on the general question of insanity.

MR. JEROME. Does your Honor, if I may be pardoned, deem it your duty to take the adjudication of four judges having within their territory the same powers or greater powers than your Honor exercises, who have rendered decisions after elaborate hearings; does your Honor desire to have those called to your attention—their decisions?

THE COURT. I think that would be pertinent.

MR. JEROME. On February 1, 1908, Mr. Justice Dowling,

justice of the Supreme Court of the State of New York, hav-
g general jurisdiction in law and equity, sat with a jury and
ied at the criminal term this man for murder in the first
gree, and for nearly seven weeks sat and listened to testimony
e bulk of which was concerned with the mental condition of
is man, because the people's whole case did not take more
an—it took forty-five minutes to put in on the first trial, that
in regard to the actual facts, about the same on the second.
r. Justice Dowling heard an enormous mass of testimony that
as addressed to that one point, and the jury rendered a verdict
not guilty, putting in their verdict, as required by the law
the state, if that was the ground of their acquittal, that in
eir opinion he was acquitted on the ground that the defendant
as insane at the time of the commission of the act. Thereupon,
r. Justice Dowling made the following order:

The defendant on his trial on said indictment having been
quitted by the jury on the ground of insanity, and the court
ing certified of the fact and the defendant being in custody,
d the court deeming his discharge at this time dangerous to
blic safety; it is ordered that said Harry K. Thaw be detained
safe custody and be sent to Matteawan State Hospital there
be kept in the state hospital until thence discharged by due
urse of law.

Your Honor will note that the court makes this order and
d no power under our statute to make it on any other ground.
en after hearing all this testimony and the defendant being
custody, and the court deeming his discharge at this time
ngerous to public safety—

THE COURT. Now, I think, to come closer to the point, the
estion here is not—even on this question of bail—the broad
estion of insanity or mental soundness, but whether in his
esent condition his liberty would be dangerous to the com-
nity.

MR. JEROME. That, your Honor nor anybody is capable
deciding until they know something of the history of the case.
alienist who would endeavor to express views in regard to
ntal condition without knowing the clinical history of the
e would be laughed out of his profession, and I submit, sir,

if I can show you a series of decisions extending over four years, your Honor should listen to me and hear it. If you do not care to do so, sir, the responsibility is not mine, but yours.

THE COURT. I will endeavor to take care of that part of it, Mr. Jerome. I shall be cautious on that question. I think we could confer, perhaps, without quite so much formality as to what course should be pursued. I think I realize on an application of this kind that the responsibility is upon me of protecting the public. There is enough on the face of the papers to show that here is an unusual element to be considered. Now, whether I shall sit here myself on the question of bail and hear testimony or whether I shall devise some other proper scheme for laying the foundation for action, is something I shall have in mind.

As to the first question that you suggest to be considered, as to whether any bail in any amount would be productive of the presence of the man when his case is ultimately decided, what am I to consider on that, that he is being proceeded against here because he is an insane person and should be returned to Matteawan or because he is being proceeded against on the charge of conspiracy to escape?

MR. JEROME. If your Honor has already made up your mind prior to argument on the question that an insane man cannot commit a crime, it will be needless for me to discuss it. If your Honor's mind is still open on that subject; if your Honor is willing to concede that an insane person is responsible for crime, then the State of New York would say to your Honor very frankly, we expect to take this man back; we expect to try him and punish him for his crime, and when he has taken his punishment for his crime, we expect to put him where he belongs and where he will not be a menace to the public. With that your Honor has not got a single thing to do.

We have complied with the Constitution of the United States and every provision of the Revised Statutes, and there is not anything which your Honor will find that you have got a discretion in view of the decisions of the Supreme Court of the United States among which you can exercise your discretion. You will find, sir, when you look at the decisions that will be

handed to you and study this question with the opportunity of knowing all the facts, that it will not excite your academic interest, it is so clear, it is so clear a demonstration.

The only question here now, as I understand, is whether you will admit this man to bail. You do not propose to admit him to bail if he is a dangerous man. I can show you that four courts with equal jurisdiction with yours have so decided, and after hearings of weeks, over a period, extending over a period of four years, as late as July of last year—and I offer to do it, but your Honor won't permit me to.

On the question whether he is likely to return, we have just had a full trial of a lawyer in New York, and it appeared on the record that he gave him $25,000 to bribe Russell the keeper of the institution, and it fell through, and he was convicted, and he was sentenced to state prison. Doesn't it appeal to you? Must we as lawyers lose all of our intelligence, must we indulge ourselves in technicalities and nonsense? Can any rational man in business think if a man is willing to pay $25,000 bribe to get away out of a place that he can keep him on $5,000, or $10,000., one-half the amount; if he has got money he is going to stay. You would not reason that way. I know of no sane man who would reason so in the happenings of every day life. Although we come into court and are solemnly resigned in deference to it, we are still human. The silken gown of the judge and the position of the attorney don't change human nature, and our minds work just the same way. If your Honor were having a horse trade up in the northern part of the state, we would take evidence kindred to that as very conclusive as both men would be apt to be back.

This whole line of decisions by Justice Morschauser would give your Honor a review of the whole case. Oh, these are not evidence that I want to lay before your Honor; they are records.

THE COURT. If I have the single question, if I have the responsibility of deciding the single question whether Thaw in his present condition is a dangerous man to be at large, do you think I ought to take the decision of some judge in New York, some five or ten years, or four or five years ago, on the broad question of insanity?

MR. JEROME. Yes sir.

THE COURT. You do?

MR. JEROME. Yes, because if your Honor will let me tell you why, I will show you why.

THE COURT. Yes.

MR. JEROME. Until your Honor is better informed than that judge is, are not the decisions of sister state courts entitled to some respect from federal judges, the highest court of any which we must respect, and I submit that the Constitution of the United States which makes one state respect the judicial public acts and the judicial decisions of another indicates the true course. It was not four or five years. It was just as late as July of last year that there was a hearing held for five weeks in which this man was represented by eminent counsel. It was not four or five years ago at all, sir.

THE COURT. You started with Judge Dowling.

MR. JEROME. I was going to show you there had been a uniform course for four or five years after elaborate hearings. They are entitled to some respect even if they be state judges. In the absence of any information that your Honor has before you, I see no reason why their decisions and opinions should be swept aside.

THE COURT. I do not wish you to understand, Mr. Jerome, that there is any purpose here to exalt federal judges above state judges. I do not wish you to understand that there is any purpose to disregard the reasonings or the findings of any court in New York so far as they are pertinent to the questions which I must decide; but on this single question of present condition, if it is pushed to me to decide it, I shall make the determination on my own responsibility.

MR. JEROME. That, of course, sir, you have to do. All I am pleading is that *prima facie* when there has been a seven weeks hearing and a five weeks hearing and a six weeks hearing it means something.

THE COURT. Never mind that. Let us see what the situation is here.

MR. JEROME. I wish I could, sir. If you will give me an opportunity, I will state how it strikes me.

THE COURT. Here is a man who resided in the state of New York and who was charged with a crime of a very high grade, but was acquitted on the ground of insanity. Thereupon under a New York statute, operating upon the situation, he was taken into custody as an insane person and committed to Matteawan; in other words, a man who stood in the criminal field was taken out of the criminal field and transferred to the field of guardianship and ward under papers which required that he should be kept there until sane. From that custody he escaped.

MR. JEROME. He was not committed to be kept there until he was sane, nor was he committed by virtue of the statute. The statute gave the power of deciding if his release would be dangerous. He was committed there until he was discharged by due statutory law process.

THE COURT. The statute required that he was to be kept there until sane.

MR. JEROME. No sir.

Here is an adjudication which the Supreme Court of the United States held to be all right so far as a single justice can go.

THE COURT. Where is Judge Morschauser's decision?

MR. JEROME. I can find it for you, but I do not recall the exact report that it is in. I think it is 59 Misc. 359.

THE COURT. I do not think it is of any particular consequence but my recollection of the statute is that it contemplates that the person committed shall be kept until sane,—the commitment may have been until discharged by due course of law; no one contends that he was discharged by due course of law, but the charge is that he escaped. Now, you come here and ask for extradition. You set up the charge of conspiracy. Now, I trust that you concede when we are dealing with the extradition question that we must deal with the offense which you charge. When the other side precipitates the question of bail, then there comes into this case this element of danger which I must consider.

As to your New York statute, while I am not criticising it at all, with all due deference to your attitude to the question,

I have felt and do feel that there is an important question both on the face of your papers as well as upon the constitutionality of the statute.

MR. JEROME. Is it open to you when the Supreme Court of the United States has refused to grant a writ of error, and when it can take it up to the highest court of the state in which it arises?

THE COURT. On a statute almost verbally the same, in the state of Washington the question of the constitutionality was raised, and the statute was sustained by the state court, and thereupon there were proceedings instituted in the Circuit Court of the United States and the circuit judge there wrote an opinion against the statute declaring it unconstitutional. The case was taken to the Supreme Court of the United States and habeas corpus was dismissed on the ground that the appeal should have been direct from the state court, and the Supreme Court expressly left the constitutional question open. The question of the constitutionality of the statute is very serious. Now that question is here. It must be met and discussed; at least, I think so.

MR. JEROME. It would be a novelty in federal jurisprudence for a judge of first instance to overrule the constitutionality.

THE COURT. You seem—

MR. JEROME. Is there no res judicata anywhere? This man went to the Supreme Court of the State of New York on this question and seven judges held it constitutional under the constitution of the United States. He then in the method prescribed by law goes to the Supreme Court of the United States and says, won't you review this, and Mr. Justice McKenna sweeps it aside; he does not even think it is worth while writing an opinion on. There must be a termination of litigation somewhere.

THE COURT. There should be. But on the question of the New York statute, you need not borrow any trouble on the supposition that I shall deal with it. I think there is a question for the Supreme Court, and I intend the parties shall have an opportunity to present it.

MR. JEROME. Then why not formulate it, so we can get ahead somewhere? Why not formulate it, sustain this writ and stay the execution of your order discharging the prisoner pending appeal? Let us go up, if your Honor please. If it is so serious that the Supreme Court of the United States should pass on it, let us get it there. Sustain the writ or rather dismiss the writ, discharge the prisoner and stay the execution pending appeal.

THE COURT. Well, I will consider that. The immediate question is on bail. Is there anything further to be said?

MR. JEROME. I would like to call your Honor's attention to a further adjudication on this subject, this man being a dangerous man to be at large. If your Honor does not desire to be informed as to that, though, it would be impertinent for me to go ahead.

THE COURT. I think you may as well assume that this petitioner will not be bailed until,—there is enough on the face of the papers to show that he should not be bailed until this court has in some way determined the question as to whether it would be a prudent thing.

MR. JEROME. Let me submit this memorandum which refers your Honor to these decisions.

THE COURT. I will take that.

(*Paper handed to the Court.*)

Is there anything more to be said?

MR. JEROME. May I return these papers?

(*Papers handed to the Clerk.*)

(*To the Clerk*) I had no idea, Mr. Clerk, that you contemplated printing these papers, or I should have sent them to you.

THE COURT. That is the stenographer's report, Mr. Jerome?

MR. JEROME. Yes sir.

I say in my own defense, that as I read this letter over hastily and as I re-read it now, there is nothing in the letter of the clerk that suggests in any way, as I read it, that it is contemplated to print them.

THE COURT. I wrote the clerk to forward this transcript first to you.

MR. JEROME. And he quotes your letter here, saying it was sent to me for correction. I supposed, your Honor, if there was a session here and anybody wanted to have a copy of the talk that took place before your Honor—

THE COURT. I supposed I was doing a courteous act to you, Mr. Jerome.

MR. JEROME. I have no doubt that your act was tendered in the sense of a courtesy. My observation of your Honor leads me to that conclusion. I should never reach any other conclusion.

THE COURT. I wrote the clerk, as follows:

> "I return stenographer's transcript of notes taken at Thaw hearing at Concord. I have made a few verbal corrections of my own without changing the substance. Please send the enclosed to Mr. Jerome, telling him that under our practice here we make verbal corrections not changing the substance, and that the same liberty is exercised by counsel if they desire to make corrections. Ask him to return to you as early as convenient: then you will see that the other side has it for the same purpose. There is much in it that might be omitted altogether, but there would probably be a good deal of difficulty in getting all concerned to agree to strike it out."

I think, on reflection, Mr. Jerome, that you should hardly suggest lack of speed until you return the paper.

MR. JEROME. I made no suggestion of lack of speed.

THE COURT. You drew a rather suggestive contrast between procedure here and in New York.

MR. JEROME. Our proceeding in New York is equally dilatory with yours. I think this particular proceeding by some suggestion might be expedited.

THE COURT. I don't think the man who holds the papers in his pockets has the floor to criticise.

MR. JEROME. Be fair, Judge, with me.

Did you ever hear in your whole life of idle talk—because the most of it is—of counsel being deemed and treated as a part

of a record to be printed unless it involved concessions of some kind or stipulation?

THE COURT. You don't give me an—

MR. JEROME. Because I am afraid you might say something that wouldn't be pleasant. I know you can if you keep talking.

THE COURT. It would be expressive of a contrary view because it is the practice in this circuit. I do not say it is right to have the evidence printed and the colloquial discussions printed if counsel waive them out.

Now, then, for a particular instance, take the Ingersoll case. It came into this circuit from Montana. Not only every word that was said by the lawyers and the judge but by the witnesses and the closing arguments to the jury was printed.

MR. JEROME. I sympathize with you in your misfortune, sir, in having to read it.

THE COURT. What does the other side say on this question of bail?

MR. SHURTLEFF. If your Honor please, we haven't much to say except that we believe that this man is not a dangerous person to be at large from our observation. We are not alienists, but we court any investigation that your Honor sees fit to make. We suggest, if you care to, that you frame an issue for a jury or that you make an *ex parte* investigation as to his present condition, or a trial by the court, and we will submit to any one of the three methods that you may choose.

THE COURT. I think the case is a bailable one so far as the crime or offense charged is concerned. But, on the face of the papers we find a man who escaped from custody in a neighboring state where he was held as an insane person, on the supposition that his liberty would be dangerous to the community. His condition there was that of a ward, and the state of New York was charged with the responsibility of protecting him and protecting the community. He escaped from that state and his present asylum is in New Hampshire, and the responsibility of safeguarding the community is on this jurisdiction—not New York. We have a new situation and a new proceeding here, entirely independent, and based upon the constitution, one which I am bound to take notice of. Now, whether I

should sit here and go into this broad question and hear the evidence myself, enter upon a hearing that is likely to take weeks, or whether I should appoint a commissioner before whom the parties can go and introduce their evidence, or whether I should create a commission on my own motion to examine this man—not on any general question which would embarrass litigation elsewhere like the general question of insanity or mental soundness, but on the sole and single question whether his liberty would be dangerous and a menace to the community. Now, that is a question, as I view it, that should be passed upon by somebody, either a commission or myself before this man is bailed. Do you want to object?

MR. JEROME. I want your Honor to read those four opinions that I have submitted to you; that is all I have got to say on the subject, and all I have got to put in.

THE COURT. I should say that I should be very derelict in my duty if I should be governed on this special question as to present condition by what was decided in New York in a different situation, by a different court on a different issue.

MR. JEROME. If your Honor will read Mr. Justice Mills' opinion (138) that is mentioned in that memorandum that I have just handed to you, your Honor will get a much more definite notion that I can give you of the whole matter, because Justice Mills not only conducted elaborate and long hearings, but he was a man peculiarly lucid and had a clear method of expressing himself, and he points out very clearly his conclusion and adjudicated and finds as a fact that this man is suffering from a particular form of insanity, and he reviews the history of it and of the testimony, and when your Honor has read that, I think, the whole matter will be much clarified. I think you will find that my contention is sound, sir, that he ought not to be admitted to bail. You see I have tried to impress on your Honor that these adjudications should have weight in the matter of judgment on this very question, and as to going into a hearing as to whether or not this man is dangerous, that will be a prolonged thing as your Honor has suggested. It will occupy a great deal of time and will cost a very great deal of money; but if your Honor feels that you cannot, after reviewing

the matters that I have called your attention to, decide this matter without it, we will pursue any course which your Honor wants to suggest. First, we do it as a matter of respect and deference to you; second, we do it because we would have to as you have got the power to compel us to.

THE COURT. I will take the matter under consideration. I will not decide it now. We might as well talk now as later about the briefs in this case. We speak of it as a record, and I want the thing speeded. When the record is printed, how much time do you want, Mr. Jerome?

MR. JEROME. Four days after I receive the record, sir, my brief will be in the hands of the clerk.

MR. JACOBS. The brief from the petitioner would properly come first?

THE COURT. I don't know about that.

MR. JEROME. I gathered from what your Honor said the last time that after the record was printed, we would file our briefs, then you would set a date for oral hearing. Then if on the oral hearing anything developed either side might file a supplemental brief, and they would have a day or two. I will file my brief within four days after receiving the printed record. It will be here after four days.

THE COURT. How much time do you want, Mr. Shurtleff?

MR. SHURTLEFF. I can't answer for all the counsel in this case, but it occurs to me that in spite of the fact that Brother Jerome thinks this matter should be laughed out of court, it is a very serious question to be decided. I may be weak-minded at the present time. Mr. Morris and I are engaged in the trial of cases in court at Berlin, and I should say we were in some fifteen jury cases that are set for trial. I cannot tell how long it will take to wind up that term, but I should say there were at least three weeks, and I don't know but four weeks of jury work there. I don't want to ask for delay for the purpose of procuring delay in this case, a frivolous purpose, but I do feel that we are not thoroughly prepared to print our brief and cannot be until we have given it considerable attention, and I would like the court to give us sometime after that December

term of court is out of way, but we shall have to abide by your decision.

THE COURT. I propose to give counsel such reasonable time as they desire. If I felt that the questions here were as easy as Mr. Jerome suggests, I should shorten the time.

MR. JEROME. Cannot the time be shortened in this way, since your Honor leaves no doubt in anybody's mind that you propose to have this question reviewed by the Supreme Court of the United States. If that is to be done after the record is printed, briefs and everything else, your Honor could sustain the writ, dismiss the writ and stay the execution, and let us get up there to make our argument in the first instance, as I gathered from your Honor's remark the matter especially in view of the case to which you have referred, seems so serious a matter that it ought to be passed upon by the Supreme Court of the United States.

THE COURT. Here is an extradition case, Mr. Jerome, where on the papers, as I have suggested several times, there is this question of insanity, and you have emphasized it this morning by talking about it, and you treat it as a very trivial question.

MR. JEROME. Yes sir.

THE COURT. Notwithstanding I have suggested several times that I thought it was a serious one, you treat it as one that ought to be decided on the run. I do not take that view of it. There is the Charlton man, the man who was recently extradited to Italy. The Supreme Court has recently in a very elaborate opinion dealt with the question of insanity in extradition. They held that insanity did not operate in that particular case because it was first raised at the extradition hearing before a trial and that it was a defense to be made at the trial in Italy.

MR. JEROME. They made clear the interstate rendition and international extradition to the principle.

THE COURT. Instead of having that case here, you have what would have been that case if Charlton had been tried in Italy and acquitted on the ground of insanity and committed to an insane asylum and had escaped. In the little research I have made in this case, I have found the remarkable condition

of no express authority either in this country or England where extradition was sought of a person who had fled from an insane hospital.

MR. JEROME. It is not sought for that purpose, sir.

THE COURT. You say so in your papers?

MR. JEROME. No.

THE COURT. But you say here that your intention is to take him back to New York and try him for conspiracy and when you have tried him for that and convicted him and punished him that you propose then to put him where he belongs.

MR. JEROME. That would be according to my own idea of due course of law.

THE COURT. Consequently your questions become serious and should receive proper deliberation. And on these questions that we have I want to adopt a course that will not only satisfy myself as to its propriety but one which will satisfy counsel on both sides if possible. I will take the case under consideration.

You should go forward, I think, with your brief, Mr. Shurtleff.

MR. SHURTLEFF. Yes, your Honor. Can we have thirty days from the time the case is printed?

THE COURT. Do you object to that, Mr. Jerome?

MR. JEROME. I certainly should, sir. I am not void of engagements myself and very numerous ones, and I have tried to get them put off. I have been successful in putting them off in order to discharge this particular public duty.

THE COURT. In determining the question of time, I think I must not lose sight of the historical phase here that lies underneath the question whether extradition shall operate in the field of guardianship and ward. That has never been understood before.

MR. JEROME. We make no such claim. We concede that it should not be.

THE COURT. There has been no extradition for such an escape as this, either between this country and any other country or between states.

MR. JEROME. We make no claim to extraditing him for the escape.

THE COURT. You describe the escape in your papers.

MR. JEROME. The escape is an overt act.

THE COURT. There comes the question, I am simply suggesting that you consider these things in respect to time. Will twenty days do, Mr. Shurtleff, with the understanding that you are at liberty to apply to the court for further time?

MR. SHURTLEFF. We will do that. I cannot understand how anybody is injured if we have thirty days in which to file this brief. I can say certainly if Mr. Thaw is admitted to bail that nobody can be injured. I cannot see how the state of New York can be injured in any way if we are allowed thirty days in which to file this brief. With that understanding that we are to have twenty days and if we deem it necessary shall apply for further time, I am content.

THE COURT. You may take twenty days with that understanding, and the other side has twenty days with liberty to file the brief as much earlier as they desire and ask for a hearing. These are matters that have no reference to the question of bail. It is on the general questions I am talking about. Is that all?

DISTRICT COURT OF THE UNITED STATES.

DISTRICT OF NEW HAMPSHIRE.

IN RE

PETITION OF HARRY KENDALL THAW FOR WRIT OF HABEAS CORPUS.

RESCRIPT ON APPLICATION FOR BAIL.

(December 17, 1913.)

ALDRICH, J.

Under the petitioner's motion to be admitted to bail, some appropriate method must be devised for inquiring into the public phase of the question presented. If we look to the face of the papers, it will appear that extradition is sought for a crime, declared by a New York statute to be a misdemeanor only, and not because he is an insane person escaping from custody. This reference to the nature of the charge is for the purpose of stating the present question, and not for the purpose of defining the limit or scope of inquiries to be made to specific or general questions which may possibly hereafter arise.

For the purposes of the present question, therefore, we have a situation in which the right of bail exists, and the right is absolute whether viewed under the statutes of New York, the statutes of the State of New Hampshire, or the Federal laws, unless liberty of the petitioner under bail would be a menace to the community. It would not be interesting to inquire into the historical oppressions or other reasons which led to making the right of bail absolute in this country, except to say that they were sufficient to warrant imperative declarations in constitutions and statutes that persons charged with the lesser crimes shall be entitled to bail; and for putting courts and magistrates under the imperative mandate that bail shall be granted except in cases of grave crime.

The right of bail, however, is subject, like all other personal rights, to being influenced by considerations of public policy and public safety. This petitioner was put on trial some years ago charged with a high crime, and was acquitted on the ground of insanity, and he was thereupon, under a New York statute, committed to the Matteawan Hospital for the Insane. As a result of these proceedings, and according to the theory of the subsequent New York cases in respect to them, the petitioner was held at Matteawan, not as a criminal, but as a person whose liberty would be a menace to the community.

There is no pretence in any of the New York cases that there was any authority, under the New York law, for holding him, or suggestion of any purpose on the part of the learned judges dealing with the situation to hold him, beyond the time at which he would cease to be a person whose liberty would be a menace. Indeed Justice Morschauser says in deciding one of the Thaw habeas corpus cases before him, referring to the verdict, and quoting the statute, "The court, must, thereupon, if the defendant be in custody, and they deem his discharge dangerous to the public peace or safety, order him to be committed to the state lunatic asylum until he becomes sane," and again, "until he has recovered or until such time as it shall be reasonably certain that there is no danger of a recurring attack of the delusion or whatever it may be." (People v. Baker, 59 Miscellaneous Reports, New York, 359, 361, 365).

Mr. Justice Rich, in discussing the question of the constitutionality of the statute, and, in referring to the nature of Thaw's custody and to the statute (133 Appellate Division Reports Supreme Court, 159, 168), says, "both are temporary expedients exercised for the purpose of discharging the duty the state owes the public of protection from the danger incident to permitting freedom to a person mentally deranged," and again referring to the duty of the state, "It is its duty to protect the public, as well as the unfortunate himself," and again "He could not be detained a moment after establishing his restoration to sanity," and it is pointed out by the learned justice that such duty is discharged and such authority exercised under the police power of the state. Again, Mr. Justice Jenks, in the

course of his opinion in the same case, says, "Such a commitment is not for the punishment of such a defendant for there can be no punishment for him who has been acquitted, but it is for protection for the public made in the exercise of the police power of the state * * *. The commitment can last only so long as the defendant is insane and he has the right at any time under the law to have his sanity determined upon habeas corpus * * *. The order of commitment settles nothing finally or conclusively against the person committed."

Indeed Justice Mills, in the course of his opinion, and in reviewing the various proceedings, in New York, involving Thaw's mental condition, said, that the prior hearings, and quasi judicial determinations, did not operate to put the question of present mental condition under the *res judicata* rule; that Thaw was only to be held until his enlargement would not be a menace to the public; that he was not in a hospital as a criminal to undergo punishment, but there to be treated with consideration and privileges, not incompatible with discipline, with the hope that he might ultimately recover.

This New York decision was in 1909, it assumes that Thaw has the right to bring as many habeas corpus proceedings as he deems necessary to protect his legal rights; and that the question of mental condition is always open under such a proceeding. The reasoning of Justice Mills not only applied to the then present mental condition, but it reaches here and includes this proceeding, and extends into the future, and its force, in effect, ordains, not that Thaw's present condition would be a menace to the public peace and safety, if he were at large, but that the question of mental condition is now open, and that this court, and all future courts, having jurisdiction, and the responsibility of the question of Thaw's mental condition, must deal with it as an open one. *People ex. rel. Thaw* v. *Lamb Superintendent of Matteawan State Hospital*, 118 N. Y. S. 388.

There have thus been several hearings in Thaw's case in New York upon habeas corpus; and it is perfectly correct, I think, to say that the theory of them all is that the petitioner was held under the police power of the state during such time as his liberty would be dangerous to himself and to the community,

and that they make no suggestion whatever that any finding of fact upon a question relating to danger to himself or the community is conclusive upon any issue of fact involved in any subsequent proceeding. Indeed, it would be quite consistent with the theory of the New York authorities to say that if the petitioner were in Matteawan today, and his case were under hearing in New York upon habeas corpus, that the fact of sanity or insanity, of menace or no menace, of danger or no danger, would not be accepted as one concluded by any of the previous findings or adjudications. The petitioner, being thus held under the duty of protection, and under police power exercised as a temporary expedient, escaped, and was subsequently apprehended and taken into custody in this jurisdiction.

Extradition proceedings were instituted before the governor of New Hampshire. Subsequent to custody by New Hampshire state authority, and before executive action, habeas corpus proceedings were invoked in the United States court by the person escaping from New York protection, and in his petition it was alleged, speaking generally, that he was restrained of his liberty in New Hampshire without due process of law, and in contravention of the constitution, and he is now held in custody by virtue of the authority of such a proceeding; and, alleging himself to be a citizen of Pennsylvania, he now moves for an order of bail.

The fact of Thaw's escape, not from a custody holding and punishing him as a criminal, but from New York's jurisdiction, guardianship, and protection, and the fact of his having been found here, (something for which this jurisdiction is in no way responsible), operate to transfer, temporarily at least, and until the question of the right of extradition is determined, the duty and responsibility of protecting the community and of protecting the petitioner. This jurisdiction, speaking in the extradition sense, is for the present his asylum, and the duty of determining the question of menace, arising upon the motion to be admitted to bail, rests here, and questions about it must be solved here, and they have reference, as they would if the petitioner were at Matteawan and the questions were today raised in the New York courts, to his present mental status;

and the question in respect to menace must be accepted here, as it doubtless would be accepted in New York, as an open question to be solved upon appropriate ascertainments made in an orderly way.

In a recent discussion arising upon this motion for bail, the general questions involved in the extradition proceeding were referred to as questions involving such difficulties that they would necessarily require time, and because the question of time has some bearing upon the question of bail; and the New York habeas corpus cases are referred to in this rescript not only because they are deemed to be authorities of weight and entitled to deference, but because it has been urged upon me with rather extreme emphasis that they ought to be accepted as conclusive of the question of present menace involved in the broader question of public protection, a view which I do not accept, and a view which I have no reason for thinking the New York courts would accept.

Under the extradition proceeding, the claim of New York is entitled to very favorable consideration, not because of alleged insanity, but because of the charge of a misdemeanor. In this sense it is not perceived that discharging the duty and answering the responsibility of dealing with the question of danger to the public peace and safety while the petitioner is within this jurisdiction, involves any antagonism to the attitude of the New York courts, and it is certain that it involves no lack of deference to the learned New York judges who have dealt with the difficult questions involved in the cases of this petitioner.

The petitions for the writs, and the answer, or replication, of the petitioner raise certain questions, and among them:

First, That, while upon the papers extradition is sought for the crime of conspiracy to escape, the real and substantial purpose is to procure extradition for "re-confinement" in the Matteawan Hospital, and thus that there is bad faith in the extradition sense.

Second, That the case is not an extraditable one, because on the face of the papers, New York is seeking to have a person extradited whom it was holding under process directed against an insane person.

Third, That, upon the face of the papers, the commitment and the entire process since the verdict of acquittal is based upon an unconstitutional statute.

It is only necessary to state these questions to show that their proper solution will require considerable time here and elsewhere. Among the points which the answer raises against the constitutionality of the New York statute is, that the statute contemplates commitment upon the verdict of the jury, based upon mental condition at the time of the alleged homicide, without a trial upon the question of mental condition at the subsequent time of commitment, and that the statute does not furnish adequate remedies for relief.

Although the constitutional question involved was determined in New York by a divided court, and although a similar statute, which was sustained by the Supreme Court of the state of Washington, was, in respect to its enforcement, declared against by the United States Circuit Court, for the district including the state of Washington, and although the Supreme Court of the United States expressly left the constitutional question in that case open, it would hardly be expected that much should be done here except to hear the parties and have the record put in shape for the Supreme Court, because, ordinarily, a court of first instance, in another jurisdiction, would not assume the responsibility of discharging a petitioner under habeas corpus proceedings upon the ground that a state statute, which had been declared constitutional by the highest court of the state, was not a valid one.

The other position, which relates to the crime described, and to the person described, raises a question whether the papers describe a crime and a person within the meaning of the Federal Constitution, and therefore that position is one in respect to which the responsibilities here are somewhat different.

If it be true that there is no case in this country, or in England, where a person has been extradited to a demanding state or country which had adjudged him insane, and was holding him as an insane person, for corrective purposes, at the time of his escape and flight, and if this, therefore, is a case of first instance, it will readily be seen that the question presented is one of possibly far-reaching consequences, and one which would require careful argu-

ment by counsel, and careful considération by courts having the responsibility of making proper determinations. The questions involved are stated, not for the purpose of deciding them, or making any intimations about them, but as bearing upon the question of bail in the sense that they are questions of gravity which will properly require time.

Now, what shall be done with the petitioner pending the decision of these questions? Under the law, whether his right is tested by the New York law, the New Hampshire law, or the Federal law, he is entitled to bail as a constitutional or statutory right, unless his liberty under bail would be a menace to the community. The right of liberty, however, like all other rights, is subject to limitations or restraints put upon it by the necessities of public peace and well-being. The question, therefore, is one of a public character, and one not necessarily to be determined in an adversary or partisan contest. How shall the question be determined here? It is supposed that here, as well as in New York, such a question might be inquired into upon a hearing before the court, with numberless partisan expert witnesses for and against, and a long drawn out trial. A master might be appointed with power to listen to the parties and their witnesses at an adversary hearing; or a suitable non-partisan commission might be created to make examinations of the petitioner and observe his conduct, and after all has been done which should be done for the public interests, to report its opinion on the question whether his being at large under bail would jeopardize the public peace.

I prefer not to appoint a commissioner for an adversary hearing, because such a hearing would involve a revival of undesirable agitation and an unnecessary disturbance of the public mind. I prefer not to hear it myself, upon adversary expert testimony, unless it is my imperative duty to hold such a hearing, and I think it is not, at least at this stage of the proceeding.

This particular question, under a motion for bail, being one of a public character, at least one having a public phase, and relating to the responsibility of protection, and one into which personal rights, aside from the right of the petitioner, enter very little, if at all, I have no doubt of my authority to create a non-partisan commission to promote a non-partisan inquiry

in the interests of the public security and welfare. I shall, therefore, create a commission in whose judgment I would have more confidence upon a question of this kind than I would in my own based upon a public adversary hearing with partisan experts, and one which I think will better answer all possible public fears.

I think the particular question involved here has reference to the present mental condition in respect to probable danger and hazard, and not to the abstract question of unsoundness or insanity. Practically speaking, a question like the one under consideration could not be determined upon that abstract question, because a person might be insane and at the same time absolutely helpless and absolutely harmless. It is doubtless because of this view that the theory of the New York courts is, that the question of mental condition should always be treated as an open one, and that Thaw should only be held until his mental condition is such that his liberty would not be dangerous to the public.

The theory of the New York judges being that Thaw was held at Matteawan as a ward of that state, and not as a criminal for purposes of punishment for crime, and, as he stands here in this extradition proceeding charged with a misdemeanor only, and as, under the motion, the right of bail exists here as a constitutional or statutory right as it would in New York, upon a charge of a misdemeanor only, unless his liberty would be dangerous to the public, and as upon that question here, as it would be in New York if he were there charged with a misdemeanor only and moving for bail, the mental condition in respect to present danger is an open one, and thus upon the situation here, as between him and the jurisdiction of his present asylum, it becomes a question in all essential and substantial respects one of a public character, and there should be such an inquiry into his mental condition as will satisfy all reasonable considerations of the public good.

It is thought, therefore, that a commission comprising competent and reputable non-partisan experts will be reasonable to the petitioner, and will best satisfy public concern, if any there be.

The commission is not appointed for the purpose of listening to experts upon an adversary hearing, but for making such

observations and examinations as it sees fit to make as to Thaw's present condition; and, whether he is insane or not, its opinion is sought upon the single and sole question whether it is reasonably probable that his liberty under bail would be dangerous to the public peace and safety.

Having made such observations and examinations as the commission sees fit, it will be open to the commission, upon the question of present danger, to give all interested parties leave to appear and offer evidence in respect to acts, if any, since his committal to Matteawan, tending to show personal violence, or any manifestations of a tendency, or disposition, to do physical harm. This will, of course, include the evidence of Mr. Nute, the Marshal, and Mr. Drew, the sheriff, who have had the petitioner in keeping, and who have had recent opportunities to observe his conduct.

It is not intended that there should be a broad trial upon the general question of insanity, because it is not the purpose, in dealing with this particular question of public phase and menace, to embarrass any subsequent litigation where the broad question of insanity might be involved.

The theory of the New York courts being that Thaw's custody at Matteawan was not as punishment for crime, but for recovery of harmless or non-dangerous mental poise, and that the question of recovery is one which is to be treated as always open, and the question here being only one of mental poise in respect to public danger, the answer to that question is the only one upon which the opinion of the commission is sought.

It is open to the commission at all times to make application for instructions, or for limitations or enlargements of the scope of the submission.

Let a commission issue to Honorable Frank Sherwin Streeter, of Concord, New Hampshire; Dr. Morton Prince, of Boston, Professor Emeritus, Tuft's College Medical School, and Physician for Nervous Diseases Boston City Hospital; Dr. George Alder Blumer, Physician-in-chief and Superintendent, Butler Hospital for the Insane, at Providence, Rhode Island; Doctor Charles Parker Bancroft, Superintendent of the New Hampshire State Hospital for the Insane, at Concord, New Hampshire;

with authority and limitations not inconsistent with the suggestions contained in this rescript.

When the report comes in, the parties may have leave to be heard further on the question of bail.

COMMISSION.

[December 17, 1913.]

UNITED STATES OF AMERICA.

DISTRICT OF NEW HAMPSHIRE, ss.

At a District Court of the United States, begun and holden at Concord, within and for the District of New Hampshire, on December 17, 1913,

PRESENT:

Honorable Edgar Aldrich, District Judge.

No. 86, Law.

In re

PETITION OF HARRY KENDALL THAW,

for Writ of Habeas Corpus,

Under a Motion to be admitted to Bail.

To

Honorable Frank Sherwin Streeter, of Concord, New Hampshire;

Doctor Morton Prince, of Boston, Professor Emeritus, Tuft's College Medical School, and Physician for Nervous Diseases Boston City Hospital;

Doctor George Alder Blumer, Physician-in-chief and Superintendent, Butler Hospital for the Insane, at Providence, Rhode Island;

Doctor Charles Parker Bancroft, Superintendent of the New Hampshire State Hospital for the Insane, at Concord, New Hampshire;

You are hereby made a Commission and your opinion is sought upon the single and sole question whether it is reasonably probable that Harry Kendall Thaw's liberty under bail would be dangerous or a menace to the public peace and safety. Your observations and examinations, and the hearings before you, if any, are to be consistent with and not inconsistent with the rescript of December 17, 1913, hereto annexed.

You will be sworn to the faithful discharge of your duties.

Dated this 17th day of December, 1913.

BURNS P. HODGMAN, *Clerk.*

(SEAL)

Report of Commission.

[Filed January 10, 1914.]

To the Honorable Edgar Aldrich, Judge of said Court:

We, the undersigned, appointed a commission, under an Order dated December 17, 1913, to advise the court whether it is reasonably probable that Harry Kendall Thaw's liberty under bail would be dangerous or a menace to the public peace and safety, having concluded our observations and examinations and fully considered the same, report as follows, namely:

I. The commission took and filed the oath required by the Order.

II. Authority and Duty.—By the Order of the court the commission was not appointed for the purpose of listening to experts upon an adversary hearing, but for making such observations and examinations as it sees fit to make with reference to Thaw's present condition; and whether he is insane or not, the opinion of the commission is sought upon the single and sole question above stated. Authority was conferred upon the commission to give all interested parties leave to appear and offer evidence, if any, since Thaw's committal to Matteawan (February 1, 1908) tending to show personal violence or any manifestations of a tendency or disposition to do physical harm.

III. General Statement.—The detailed history of the Thaw case prio to this proceeding is notorious and need not be recited here. The following statement is made for a better understanding of the method adopted, the character and extent of the observations and examinations made, and the grounds upon which the conclusions of the commission are based.

(*a*) On a second trial in January, 1908, the jury returned a verdict of acquittal on the ground that Thaw was insane at the time of the homicide, June 25, 1906. In rendering judgment on the verdict the court declared that the form of insanity, and the only form which the jury could have found on the testimony, was "manic-depressive insanity." The court, deeming Thaw's discharge at that time to be dangerous to the public safety, ordered that for the time being he be detained in safe custody at the Matteawan State Hospital. (People v. Chanler, 177 N. Y. Sup. 322, at p. 327.) He was committed to Matteawan February 1, 1908, and there detained until his escape August 17, 1913.

(*b*) Examination of Testimony and Documents.—We had before us the official record or case book of the Matteawan State Hospital, showing all the entries made therein relating to Thaw from February 1, 1908, to August 17, 1913. These entries included the history of the case recorded on his entrance and the various mental examinations made by the hospital superintendents and their assistants in the performance of their official duties. Among these examinations was one made by the superintendent and his assistant in November, 1911, covering about 175 pages of typewritten questions and answers.

We also had before us the transcripts of three cross-examinations of Thaw by counsel representing the state of New York on habeas corpus proceedings instituted by or on behalf of Thaw. The first was the cross-examination before Justice Morschauser in May, 1908; the second before Justice Mills in July and August, 1909; and the third before Justice Keogh beginning June, 1912. All these cross-examinations (except that before Justice Morschauser which was brief) were of great length and covered the most searching inquiry into Thaw's mental condition and attitude, not only at the date of the respective examinations but with reference to all the acts of his life. If the cross examiner omitted to inquire into any detail of Thaw's acts, thoughts, feelings or mental process before or leading up to or subsequent to the homicide in June, 1906, such omission is not apparent from the transcripts of cross-examinations before us. In this way we have had photographs more or less distinct of Thaw's mental condition on the dates above named, and his then mental attitude with reference to all the acts of his life.

We also had before us various exhibits, letters, and other documents used upon the two trials for homicide, and in other proceedings, some of which were furnished by counsel for the state of New York and some by Thaw's counsel.

(*c*) On January 7th a public hearing was held at which all interested parties were given leave to appear and offer evidence in respect to acts, if any, since the committal of Harry K. Thaw to Matteawan, February 1, 1908, tending to show personal violence or any manifestations of a tendency or disposition to do physical harm, and evidence to the contrary. Counsel for the state of New York declined to appear on the alleged ground that our power under the order of the court was inadequate to a determination of the question submitted. Counsel appeared for Thaw and offered evidence of his custodians since September 18, 1913, on the above question, which evidence was received and considered.

(*d*) Mental Examination by the Commission.—We began our mental examinations of Thaw on December 23rd, continued the same on the 24th, resumed on the 29th and 30th and from time to time thereafter until the preparation of this report. These examinations covered a searching inquisition into all the acts of his life, including a review of his statements thereon made in the various cross-examinations above referred to. They also included an examination of his present and former mental attitudes with reference to all his acts prior to, at the time and subsequent to the homicide, and a comparison of his present statements with those made on each of the former examinations above referred to.

(*e*) Physical examination.—We also made a careful physical examination which will be hereafter referred to.

The foregoing is intended as a summary of the work of the commission and not as a complete detailed statement.

IV. To determine the immediate question before us, our inquisition was necessarily directed to four points:

1. Careful physical examination to determine the presence or

absence of structural or functional disturbance of the nervous system;

2. The conduct of Harry K. Thaw since his commital to the Matteawan State Hospital on February 1, 1908, up to the present time;

3. Whether he is now suffering from such disease of the mind, or whether his present condition of mind, whatever it may be, is of such character as to predispose to acts of violence, independently of the narrower question whether such acts actually have been committed since his confinement or not;

4. The circumstances and conditions which outwardly and inwardly led to the homicide on June 25, 1906, and the probable condition of mind of Harry K. Thaw at that time.

In its studies and deliberations the commission has in the main confined its attention to facts, preferring to attach little importance, for its purpose, to the conflicting opinions of expert and other witnesses in adversary hearings.

As the result of this careful search for the truth, and having had in view all that has been adduced for and against the allegation of constitutional inferiority, we have arrived at a definite and positive opinion as to the present mental condition of Harry K. Thaw and his probable state of mind at the time of the homicide. We refrain from expressing our opinion on these points, in view of the specific terms of the rescript whereby our advice has been sought by the court namely,—

"It is not intended that there should be a broad trial upon the general question of insanity, because it is not the purpose, in dealing with this particular question of public phase and menace, to embarrass any subsequent litigation where the broad question of insanity might be involved."

V. Upon the question of menace or danger through the granting of bail, we may, however, be permitted, and are probably compelled, to record our finding that, whatever may have been the mental condition of Harry K. Thaw at the time of the homicide, upon which question we express no opinion, he is not now suffering from any of the forms of mental disease alleged by the prosecution at the time of the trials or subsequently thereto, namely,—manic-depressive insanity, paranoia, dementia præcox, or delusional insanity.

VI. In our opinion it is reasonably probable that Harry Kendall Thaw's liberty under bail would not be dangerous or a menace to the public peace and safety.

FRANK S. STREETER.
MORTON PRINCE.
G. ALDER BLUMER.
CHARLES PARKER BANCROFT.

Concord, New Hampshire.

Correspondence and Report of Evidence Before Commission.

[Filed February 2, 1914.]

(Letter to Clerk.)

CONCORD, N. H., February 2, 1914.

re Thaw Commission Furnishing Transcript of Stenographic Notes and Copies of Correspondence.

rus P. Hodgman, Esq., Clerk U. S. District Court, Concord, N. H.

DEAR SIR: Upon your suggestion that Judge Aldrich thinks it uld be well for the commission to pass to you all correspondence h reference to its hearings in the Thaw case, together with the nographic report of the evidence taken before the commission, the end that the same may be filed and become a part of the ord, speaking for the commission I have to say:

That the testimony of Holman A. Drew, Clark D. Stevens and gene P. Nute, Thaw's custodians, was taken stenographically at blic hearings January 7th and 9th, and the transcript of the nographic notes is herewith submitted.

There were no stenographic notes taken of the various oral minations of Thaw between December 23rd and January 8th usive.

At the first meeting of the commission on December 19th it decided, among other things, to examine all the hospital rec- of Matteawan State Hospital in any way relating to Thaw since original commitment to that institution. Annexed hereto are es, arranged chronologically, of all the correspondence between commission and New York counsel relating to this and other ters. Included therein is a copy of notice issued by the com- sion December 30th for the hearing on January 7th, all of ch I hand you to be filed.

Very truly yours

FRANK S. STREETER,
Chairman, for the Commission.

(Letter to William Travers Jerome.)

CONCORD, N. H., December 20, 1913.

uest of Commission Appointed in re Motion of Harry K. Thaw to be Admitted to Bail.

. William Travers Jerome, Deputy Attorney General of the ate of New York, 37 Wall St., New York City.

EAR SIR: In the matter of Harry K. Thaw's motion to be ad- ed to bail, now pending in our United States District Court, the

Commission appointed by Judge Edgar Aldrich to make certain examinations and report to the court, held a preliminary meeting or conference in Boston yesterday.

Among other things, the Commission desire to examine all the hospital records of Matteawan State Hospital in any way relating to Thaw since his original commitment to that institution. If certified copies of all said records can be furnished at an early date all concerned will thereby be greatly convenienced.

I am directed to ask if you can and will furnish such certified copies, and if so when we may expect to receive them.

Very truly yours,

FRANK S. STREETER, *Chairman.*

(Telegram from William Travers Jerome.)

Western Union Telegram.

NEW YORK, N. Y., Dec. 22, 1913.

Frank S. Streeter, Concord, N. H.:

Have just returned to New York after a week's absence. Will write you tomorrow morning. Think I can comply with your request satisfactorily.

WM. TRAVERS JEROME.

6.15 p. m.

(Letter from William Travers Jerome.)

37 WALL STREET,
NEW YORK, December 23, 1913.

Frank S. Streeter, Esq., Concord, New Hampshire.

DEAR SIR: Replying to your communication of December 20, 1913, in the matter of the motion that Harry K. Thaw be admitted to bail, which, owing to my absence from town only reached me yesterday, I beg to say that I do not believe that it would be practicable for me to obtain for you certified copies of all Hospital records of Matteawan State Hospital in any way relating to Thaw since his original commitment to that institution, as these are extremely voluminous and a portion of them were prepared under circumstances which sworn testimony in court shows to have been such as to render them, in part, extremely unreliable. In other words, the Superintendent of the Asylum at one time was very much under the influence of Thaw and his friends, and an effort was made by Thaw to bribe him by paying him $25,000. Thaw's lawyer, involved in these transactions, has since been sentenced to State's Prison, but upon that trial and upon another hearing facts appeared in the sworn testimony, indisputable in character, that would lead to the inference that whatever might appear in the records at Matteawan by direction of Dr. Russell was open to the gravest question.

There are, however, two physicians who, as Deputy Superintendent and as Superintendent of Matteawan, have had Thaw under

observation in Matteawan during the entire time of his confinement in that institution. One is Dr. Kieb, the present Superintendent, and the other is Dr. Baker, who was at the institution when Thaw was committed and who had him in custody for many years. These two doctors I think it would be possible to produce before you, and I could have Dr. Kieb bring with him the records, or what in our parlance is known as the case book.

If you desire that these doctors should appear before you for the purpose of giving you such information as they can in respect to Thaw's mental condition while confined in Matteawan, I will endeavor to secure their attendance at such convenient time and place as you may indicate, and will also have Dr. Kieb bring with him the case book of Matteawan. Neither of these doctors, of course, would be produced as experts in the sense of being called upon to testify to hypothetical questions, but could give you the result of their observation of Thaw during the past five and one-half years that he has been confined in Matteawan. If you desire their attendance, it would greatly facilitate them and their counsel if you could hold your hearings in Boston rather than in Concord.

I am desirous of in every way facilitating your inquiry and of keeping it strictly within the lines indicated by Judge Aldrich in his rescript. This whole matter has become extremely burdensome and expensive, but the inclination of the New York State authorities is to do whatever may be asked of them, either by the Court or by your Honorable Commission.

Trusting to hear from you speedily on this question, I remain,

Very truly yours,

WM. TRAVERS JEROME.

(Letter to William Travers Jerome.)

CONCORD, N. H., December 24, 1913.

Request for Matteawan Hospital Records by Commission Appointed in re Motion of Harry K. Thaw to be Admitted to Bail.

Hon. William Travers Jerome, Deputy Attorney General of the State of New York, 37 Wall St., New York City.

DEAR SIR: The Commission received your telegram of the 2nd saying "think I can comply with your request satisfactorily," and have also received and considered your letter of the 23rd giving your reasons for not furnishing such records unless in connection with the testimony of persons indicated by you.

While desiring to conform to all reasonable suggestions that you may make in behalf of the State of New York, the Commission feel that, in the first instance, they should have the opportunity to examine the entire official record as it now stands, leaving for subsequent determination the course which they will then take with reference to any testimony which may be offered either to impeach or sustain the same.

It is not the purpose of the Commission to hasten unduly the pro-

ceedings before it; on the other hand it desires to act with reasonable promptness in obtaining the facts upon which its opinion must be based under the order of Judge Aldrich.

Be good enough to reply quickly what you can and will do to aid the Commission in making its desired examination of such official records without unnecessary delay.

Yours truly,

FRANK S. STREETER, *Chairman.*

(Telegram to William Travers Jerome.)

CONCORD, N. H., December 24, 1913.

William Travers Jerome, 37 Wall St., New York City:

Please reply quickly as possible to letter sent this afternoon to your office.

FRANK S. STREETER, *Chairman.*

(Western Union Telegram from William Travers Jerome.)

NEW YORK, N. Y., Dec. 26, 1913.

Mr. Frank Streeter, Concord, N. H.:

I will send a man with the original official records where and when you desire.

WM. TRAVERS JEROME.
5:35 p. m.

(Night Letter to William Travers Jerome.)

CONCORD, N. H., Dec. 26, 1913—8 p. m.

William Travers Jerome, 37 Wall Street, New York City:

Telegram received that you will send original official records, etc. That I may notify other commissioners, please wire tomorrow what time Monday forenoon your representative with records will reach Concord. Thaw's counsel say that entire official Matteawan records about Thaw were read into proceedings before Judge Keogh 1912. If this is correct will you also send your transcript of that hearing containing copy Matteawan records to that date. Commissioners desire to see original case book but such typewritten copy will convenience an examination.

FRANK S. STREETER.

(Western Union Telegram from William Travers Jerome.)

NEW YORK, N Y., Dec. 27, 1913.

Frank S. Streeter, Concord, N. H.:

Your telegram received. My representative with records will reach Concord Monday morning, Dec. twenty-nine at eleven o'clock a. m.

WM. TRAVERS JEROME.
11:46 a. m.

(Letter from William Travers Jerome.)

37 Wall Street,
New York, December 29, 1913.

Frank S. Streeter, Esq., Concord, New Hampshire.

Dear Sir: Mr. George F. Lewis of my office will present this letter to you and will have in his custody, by authority of the Attorney General of New York, the original records of the Matteawan State Hospital in the case of Henry Kendall Thaw. He will also have, as requested by you, a transcript of the testimony taken before Mr. Justice Keogh in the proceedings in 1912.

It is true that the Case Book was received in evidence, and under our statutes the Case Book must, in proceedings such as were held before Mr. Justice Keogh, be produced and put in evidence. It was not, however, transcribed into the minutes of the testimony, but such portions of it as counsel desired to refer to were referred to and the whole book was before the court as part of the evidence upon which its decision was made. The exhibits in the case were extremely voluminous and the originals were sometimes difficult to be deciphered as many of them were written in pencil and had been used so frequently in court proceedings as to be somewhat damaged. In order to facilitate the court in its decision the principal exhibits were printed.

I am sending you by Mr. Lewis, for your convenience in reference, the printed volume of exhibits referred to in the stenographic transcript of the minutes. I am also sending by Mr. Lewis a printed copy of my brief submitted to Mr. Justice Keogh, which may prove useful to you in examining the transcript of testimony, because of the analysis of the testimony therein contained. There is no index to the stenographic minutes, and my brief practically amounts to such an index. A printed copy of Judge Keogh's decision is also furnished. The opinions of Judge Mills and Judge Morschauser were put in evidence before Mr. Justice Keogh and are also printed in the Exhibit Book.

Mr. Lewis has, of course, no authority to leave with you the official records of Matteawan and has only authority to give you such inspection and examination of them as you may desire. He must at all times retain the custody of them. The printed papers he is authorized to leave in your custody should you desire, and he is also authorized to leave with you, for your examination and study, the typewritten transcript of the stenographer's minutes of the testimony given before Mr. Justice Keogh. He is instructed, however, should you desire to retain these for purposes of examination and study, to take your receipt therefor. This copy of the minutes is the only one now in existence, so far as I know, except such copy as the Judge had and any copy that defendant's counsel may have. Its value, therefore, you will appprecciate and understand, and I therefore cannot consent that the original transcript sent you be made a part of any report that you may make to the court and so get in the files of the Federal Court from which it might be very difficult for me to recover them.

Any further or other information that you desire, such as a transcript of proceedings before Mr. Justice Mills in 1909, or a transcript of the proceedings before Mr. Justice Morschauser in 1908, or a transcript of the proceedings upon the two trials of Henry Kendall Thaw in 1907 and in 1908, I will be glad to furnish you at any time. Any other or further assistance that I can be to you I will be glad to render.

The original exhibits referred to in the transcript of minutes sent to you are now in the possession of the District Attorney of New York County, and can be produced if you desire. These original exhibits were sent by me when District Attorney, to the asylum at Matteawan, to be made a part of the Case Book of that institution, and were well known to the medical authorities in control of that institution, and were a part of the clinical history of the case and were an element of no inconsiderable importance in their decision as to the mental condition of Thaw. After I went out of office as District Attorney of the County of New York my successor, Mr. Whitman, ordered the return of these exhibits to the District Attorney's office, where they are now, and in that way they ceased to be a part of the official records of the Matteawan State Asylum. The hypothetical question appearing in the transcript of minutes of testimony furnished you and reprinted in the printed Book of Exhibits, is the hypothetical question used upon the trial of Thaw for homicide and is a condensation of the testimony of both the People's and defendant's witnesses. An examination of it might be of value to you as giving you information as to the character of the testimony adduced upon the trial of Thaw for homicide. Should an examination of it lead you to wish to see the transcript of the testimony of which it is a synopsis and condensation, I can furnish you such transcript of the testimony whenever you desire.

Very truly yours,

WM. TRAVERS JEROME.

(Letter to William Travers Jerome.)

CONCORD, N. H., December 29, 1913.

Hon. William Travers Jerome, Deputy Attorney-General of the State of New York, 37 Wall Street, New York.

DEAR SIR: Your Mr. George F. Lewis has submitted to the Commission today a book said to be the original official hospital records of Matteawan State Hospital, and also a transcript of the evidence in the proceedings before Mr. Justice Keogh into which these original records were read, so that the Commission has a copy of the original records down to the letter of November 26, 1911, written by Mr. Thaw on 18 pages of Matteawan Hospital stationery of which the Commission has no copy.

The next document in the official records is the interview with Mr. Thaw by Dr. R. L. Leek, April 25, 1912. The Commission understands that it has a substantial copy of that in the testimony of Dr. Leek on page 124, volume 1 of the transcript.

Then follows sheets 64 to 70 beginning with April 15, 1912 and terminating in the midst of a sentence June 17, 1913. The official records stop at this point.

If you will furnish the Commission quickly with a certified copy of the letter of Mr. Thaw of November 26 above referred to, and a certified copy of the sheets of the official record from No. 64 up to August 18, 1913, the Commission understands that it thereby will have a complete copy of the official record. If you will furnish certified copies of the foregoing quickly it will greatly convenience the Commission.

In your letter handed to us by Mr. Lewis you suggest that he may leave with us the four volumes of the transcript of the stenographer's notes of the proceedings before Justice Keogh in 1912, saying that this is your copy and you do not want it annexed as an exhibit to the Commission's report but returned to you. With your permission we have retained these four volumes because they contain copies of the original official records. The Commission will make sufficient further examination of these volumes to determine what if any use they will make of their contents, and upon filing the report of the Commission the volumes shall be returned to you.

Mr. Lewis has also left with us for such use as the Commission may determine to make of them, the following documents:

a. Volume of exhibits.

b. Your brief before Mr. Justice Keogh in 1912.

c. Two printed copies of Mr. Justice Keogh's opinion.

d. Two packages of manuscript said to be in the handwriting of Thaw.

The Commission takes these for examination and will make such use, if any, thereof as their examination may seem to justify.

There seems to be nothing in the official record covering the dates from November 26, 1911 to April 15, 1912. Mr. Lewis is not sure whether there were any entries made. You can state about that.

The Commission desires to acknowledge your courtesy in sending the original records here for examination, and the transcripts containing copies of part of said records, and will also be obliged if you will furnish the balance of the copies of said official records indicated above as early as may be.

Believe me,

Very truly yours,

FRANK S. STREETER, *Chairman.*

P. S.—We have read the original minutes of Dr. Leek's interview of April 25, 1911, contained in the hospital records.

(Notice of Public Hearing.)

United States District Court for the District of New Hampshire.

CONCORD, N. H., December 30, 1913.

In re Petition of Harry Kendall Thaw for Writ of Habeas Corpus Under a Motion to be Admitted to Bail. Notice of Hearing Before Commission Appointed Under said Motion.

GENTLEMEN: In the matter of Harry K. Thaw's motion to be admitted to bail, now pending in our United States District Court for the District of New Hampshire, the Commission appointed by Judge Edgar Aldrich to make certain observations and examinations and report to the court, hereby give notice that a hearing will be held at the United States District Court Room in Concord, New Hampshire, Wednesday, the 7th day of January, 1913, at ten o'clock a. am.

At said hearing, in accordance with the order of the Court, all interested parties will be given leave to appear and offer evidence in respect to acts, if any, since the committal of Harry K. Thaw to Matteawan, February 1, 1908, tending to show personal violence or any manifestations of a tendency or disposition to do physical harm, and evidence to the contrary.

Yours truly,

FRANK S. STREETER, *Chairman.*

To William T. Jerome, Deputy Attorney General of the State of New York; Franklin Kennedy, Bernard Jacobs, Attorneys for New York; William M. Chase, Drew, Shurtleff, Morris & Oakes, Martin, Howe & Donigan, William A. Stone, Attorneys for Harry K. Thaw.

(Letter to William Travers Jerome.)

CONCORD, N. H., December 30, 1913.

In re Request of Commission to Furnish Transcripts of Examinations of Thaw in Various Proceedings.

Hon. William Travers Jerome, Deputy Attorney-General of the State of New York, New York City.

DEAR SIR: The Commission desire to examine the testimony of Mr. Thaw given at various times since 1906 in proceedings before commissions, judges or others which became a part of the public records. We understand that Mr. Thaw was examined as to his mental status in the following proceedings:

(1) Before the Commission of which David McClure was chairman, appointed by the Supreme Court in March 1907;

(2) Before Judge Morschauser at Poughkeepsie in May 1908;

(3) Before Judge Mills at White Plains in 1909;

(4) Before Judge Keogh at White Plains in July 1912.

If Thaw was examined or cross-examined as to his mental status in court or public hearings in cases other than the above we would be glad to have you refer us to those cases at once and would be glad to have you furnish us a copy of such examinations if you can conveniently do so. The Commission has the examinations which appear in the official Matteawan Hospital records which you so kindly furnished us.

Mr. Thaw's counsel agree to furnish us the transcript of his testimony before the McClure Commission in No. 1 above. We have a copy of your cross-examination of Thaw before Judge Keogh (No. 4 above) in the transcript which you sent us. We would like a copy of his testimony before Justice Morschauser (No. 2 above) and before Justice Mills (No. 3 above) as soon as practicable. Will you be good enough to send us that portion of your transcript of those records which contains the examination of Thaw. The Commission will be greatly obliged if you can send them without delay.

Very truly yours,

FRANK S. STREETER, *Chairman.*

(Letter to William Travers Jerome.)

CONCORD, N. H., December 31, 1913.

In re Hearing Before Commission—Thaw's Motion to be Admitted to Bail.

Hon. William Travers Jerome, Deputy Attorney-General of the State of New York, 37 Wall St., New York City.

DEAR SIR: In the notice sent you last night for the hearing on Wednesday, January 7th, the figures 1913 as written are of course a misprint for 1914.

Very truly yours,

FRANK S. STREETER, *Chairman.*

(Letter to William Travers Jerome.)

CONCORD, N. H., January 2, 1914.

In re Request of Commission in re Thaw for Copy of Thaw's Testimony Before McClure Commission, 1907.

Hon. William T. Jerome, Deputy Attorney-General of the State of New York, 37 Wall St., New York City.

DEAR SIR: We wrote you that Thaw's counsel agreed to furnish us a copy of his examination before the McClure Commission in 1907, but they now inform us that they have not a copy and suggest that the original was filed in District Attorney Whitman's office.

The Commission desire to examine that testimony if practicable. If you have a copy will you permit the Commission to examine it? What can and will you do to aid us on that point? If you will

wire us on receipt of this Saturday morning we shall be obliged to you.

Yours truly,

FRANK S. STREETER, *Chairman.*

(Letter to William Travers Jerome.)

CONCORD, N. H., January 3, 1914.

In re Testimony and Papers Requested of Mr. Jerome by the Thaw Commission and Papers and Documents Furnished by Mr. Jerome, and Other Matters.

Hon. William T. Jerome, Deputy Attorney-General of the State of New York, 37 Wall St., New York City.

DEAR SIR: (1) In writing you yesterday, the 2nd, about your furnishing the Commission a copy of Thaw's testimony before the McClure Commission in 1907 I omitted to say that Thaw's counsel has furnished the Commission a copy of his examination before Justice Morschauser at Poughkeepsie in May 1908, and a like copy of his examination before Justice Mills at White Plains in July and August 1909, so we need not trouble you to send these transcripts as requested in ours of the 30th ult. We hope to receive from you copy of Thaw's examination before the McClure Commission as requested.

(2) We note that you have made no reply to our letters of the 29th (sent by Mr. Lewis) or of the 30th ult. Mr. Lewis expected you would be able to have here not later than yesterday copies of that part of the case book which, with the part we now have, would make a copy of the entire case book. You will note that of the case book we are short of the Thaw letter of 18 pages under date of November 26, 1911, sheets 64 to 70 ending June 17, 1913, and sheets covering entries from that date to August 18, 1913; but we have had before us and read all the foregoing except the sheets between the last two dates which did not appear in the original case book when submitted.

Can and will you furnish the foregoing to complete our copy of the case book as Mr. Lewis promised, and if so when may we expect to receive them?

(3) Referring to your letter of December 23rd wherein you suggested that the reliability of certain specific portions of the case book was open to question, we replied on the 24th that the Commission desired to examine the entire official record or case book as it then stood,

"leaving for subsequent determination the course which they will then take with reference to any testimony which may be offered either to impeach or sustain the same."

You then sent by Mr. Lewis the case book as it stood.

If you desire to offer testimony to impeach the integrity of any portion of the official record or case book, the Commission at the

hearing on Wednesday, the 7th, will consider any request you may make to offer evidence on that point, but we think your request should be in writing and should state specifically those entries in the case book which you desire to impeach, with the names of your witnesses and a substantial statement of what you expect to show by such witnesses.

Upon your filing such written request and statements, the Commission will hear and determine what action they will take on this point.

Very truly yours,

FRANK S. STREETER, *Chairman.*

(Western Union Telegram from William Travers Jerome.)

NEW YORK, N. Y., Jan. 3, 1914.

Frank S. Streeter, Concord, N. H.:

To make copies of papers would require much time. Will send man with original transcripts if you desire.

W. T. JEROME.
2.58 p. m.

(Letter to William Travers Jerome.)

CONCORD, N. H., January 4, 1914.

Re Request of Thaw Commission for Transcript of Thaw's Examination Before McClure Commission, 1907.

Hon. William Travers Jerome, Deputy Attorney-General of the State of New York, 37 Wall St., New York City.

DEAR SIR: With reference to the transcript of Thaw's examination by the McClure Commission in 1907, which this Commission desires to see, I have your telegram received late Saturday evening as follows:

"To make copies of papers would require much time. Will send man with original transcript if you desire."

While the Commission regret putting you to inconvenience, they do desire to see the examination of Thaw before the McClure Commission, and we do not know how to obtain it unless you will furnish it. If you will send this to us so we can have it Tuesday forenoon we shall feel very greatly obliged to you. The Commission will meet tomorrow (Monday) afternoon, and would be glad to hear by wire whether you can get the document here by Tuesday at eleven o'clock.

The Commission desire to again express their appreciation of your courtesy in furnishing documents requested by them.

Very truly yours,

FRANK S. STREETER,
Chairman.

(Letter from William Travers Jerome.)

37 WALL STREET.
NEW YORK, January 3, 1914.

Hon. Frank S. Streeter, Concord, New Hampshire.

DEAR SIR: In accordance with your letter of December 29th, 1913, I beg to hand you herewith a copy of the case book of Matteawan State Hospital in regard to H. K. Thaw, beginning with a letter of Mr. Thaw, from November 26, 1911, and continuing thereafter to and including August 17, 1913. The copy sent you has been compared by Mr. Lewis of my office who has attached thereto a sworn statement that he has compared it and that to the best of his knowledge and belief it is a correct copy.

Mr. Lewis has consulted Dr. Kieb, at present Superintendent of Matteawan State Hospital, in regard to the absence in the official record of any entries from November 26, 1911 to April 15, 1912. Dr. Kieb informed Mr. Lewis that there are no entries covering that period in the case book and that he knows of none made for the case book. It seems that after a patient has been confined in Matteawan State Hospital for more than a year, it is customary to make examinations and entries in regard to the patient at intervals of about three or four months. Of course, if occasion demands it, more frequent records are made.

I trust the above will be satisfactory.

Yours very truly,

WM. TRAVERS JEROME.

(Western Union Telegram from William Travers Jerome.)

NEW YORK, N. Y., Jan. 6, 1914.

Frank S. Streeter, Concord, N. H.:

Cannot send man for McClure examination alone. It can and should be furnished by petitioner.

W. T. JEROME.
12.41 p. m.

(Letter from William Travers Jerome.)

[NOTE.—The following letter was received by the Commission about 4 p. m. Tuesday, January 6, 1914.]

NEW YORK, January 3d, 1914.

Frank S. Streeter, Esq., Chairman.

DEAR SIR: In respect to the hearing before your Honorable Body set for January 7th, 1914, there appears in your notification of hearing the following passage:

"At said hearing, in accordance with the order of the Court, all interested parties will be given leave to appear and offer evidence in respect to acts, if any, since the committal of Harry K. Thaw to Matteawan, February 1, 1908, tending to show personal violence or

any manifestations of a tendency or disposition to do physical harm, and evidence to the contrary."

This seems strictly in accordance with the rescript of Judge Aldrich. Counsel have given this matter careful consideration and have decided not to appear before your Honorable Body. We beg that you will understand that by this no discourtesy is intended, but the scope of your inquiry is so limited in our opinion as to bring ridicule upon any one acquainted with the subject who would consent to be drawn into such inquiry. To our minds it would be eminently improper to admit to bail a man who is insane. Thaw has in the past six years been four times adjudged insane after elaborate hearings, the last time being in July, 1912, after a hearing extending over five weeks. The form of his insanity has been established by judicial decision after an elaborate hearing to be paranoia or constitutional inferiority with paranoid tendencies. This form of insanity all competent alienists recognize as incurable. Already he has taken human life because of being insane. What he might do if now given his freedom no human being could tell. All competent alienists are in accord that paranoiacs or persons constitutionally inferior with paranoid tendencies should be permanently under restraint. Your power is limited by the Court to an inquiry

"in respect to acts if any, since the committal of Harry K. Thaw to Matteawan, February 1, 1908, tending to show personal violence or any manifestations of a tendency or disposition to do physical harm, and evidence to the contrary."

Such an inquiry does not contemplate an examination by you of the clinical history of the case, nor a determination of his present mental condition. The medical members of your commission will doubtless inform you that without such history the diagnosis of paranoia or constitutional inferiority with paranoid tendencies is often almost impossible. That Thaw while in Matteawan had not committed any acts

"tending to show personal violence or any manifestation of a tendency or disposition to do physical harm"

would be entirely insignificant in this class of cases in the environment of Matteawan. Matteawan has contained for the past five or six years more paranoiacs and persons constitutionally inferior with paranoid tendencies than any fifty institutions in the United States. The experience of that institution is that among such patients

"any acts tending to show personal violence or any manifestations of a tendency or disposition to do physical harm"

is extremely rare, occurring in less than ten per cent of the cases. And yet in a number of such cases where judges or juries have released the patient against the judgment of the medical men in charge of the institution, homicides or criminal assaults have been committed by the person released, although such patient had not, while confined, committed any act of "personal violence" or given any "manifestation of a tendency or disposition to do physical harm."

Counsel feel that to go on in this inquiry with its limited scope would place them in a false position and would confuse the question of upon whom the grave responsibility for the decision rests.

We must, therefore, decline to take any part in the proceedings before your Honorable Body in the restricted inquiry now being held.

Very truly yours,

WM. TRAVERS JEROME,

Special Deputy Attorney-General of the State of New York.

(Night Letter to William Travers Jerome.)

[NOTE.—Copy of night letter sent 11.45 p. m. January 6, 1914. Also mailed.]

CONCORD, N. H., January 6, 1914.

Hon. Wm. Travers Jerome, Deputy Attorney-General of the State of New York, 37 Wall Street, New York City.

DEAR SIR: Yours of the 3rd inst. stating reasons for not appearing at the public hearing to be held tomorrow in accordance with the order of the court, reached the commission at four o'clock this afternoon.

We beg leave to correct on your part what seems to be a misapprehension of the court's order and the scope of the commission's power and duty thereunder, as shown by the following quotation from your letter:

"Your power is limited by the court to an inquiry 'in respect to acts if any since the committal of Harry K. Thaw to Matteawan, February 1, 1908, tending to show personal violence or any manifestations of a tendency or disposition to do physical harm, and evidence to the contrary.'

Such an inquiry does not contemplate an examination by you of the clinical history of the case, nor a determination of his present mental condition."

The limitation of which you speak is applicable only to the public hearing contemplated by the court, to be held tomorrow, at which evidence may be offered as to acts, if any "tending to show personal violence or any manifestations of a tendency or disposition to do physical harm." In all other respects unlimited powers appear to have been conferred upon the commission "to make such observations and examinations as it sees fit to make as to Thaw's present condition," and to enable it to perform its duty of advising the court upon the only question submitted, namely,—whether Thaw's liberty on bail would menace the public safety.

The question whether Thaw was or is insane is only before us as it is involved in the determination of the question of menace through the granting of bail. The question of the petitioner's present mental condition has been and will be carefully considered and the commission is already in the third week of its examinations and observations on that very point.

The commission earnestly desire the co-operation of all parties capable of furnishing evidence that may be useful in forming a basis for its advice to the court, and if you feel that you can produce material facts, but not opinion, bearing upon Thaw's present mental condition, in addition to those we already have, we shall be pleased to have you submit them to the commission on Friday morning next at eleven o'clock.

Since we have been carefully examining for many days a mass of written evidence (much of which we owe to your kindness) bearing upon Mr. Thaw's present mental condition, it is obvious that we should not be warranted in covering that ground again. It is equally manifest, seeing that ultimate responsibility rests upon the commission, that mere opinion, in place of facts, cannot be received as a basis for our conclusion.

That you may have seasonable notice of meeting on Friday we wire this by night letter. Be good enough to wire your reply tomorrow, Wednesday, forenoon.

Yours truly,

FRANK S. STREETER, *Chairman.*

(Western Union Telegram from William Travers Jerome).

NEW YORK, N. Y., Jan. 8, 1914.

Frank S. Streeter, Concord, New Hampshire:

Under the court's order rights of interested parties are strictly limited. We must again decline to take any part in your proceedings but will give you any information you desire. You must know that the evidence showing Thaw insane introduced in his behalf at the two homicide trials is available also the evidence as to facts introduced upon the hearings in three writs of Habeas Corpus. Also the report of his own alienists, Dr. Evans and Dr. Hamilton.

W. T. JEROME,
11.21 a. m.

Evidence Taken Before Commission.

District Court of the United States, District of New Hampshire.

In re Petition of Harry Kendall Thaw for Writ of Habeas Corpus under a Motion to be Admitted to Bail.

Hearing to Determine Whether it is Reasonably Probable That Harry Kendall Thaw's Liberty under Bail Would be Dangerous or a Menace to the Public Peace and Safety.

Before the Commission appointed by Honorable Edgar Aldrich, District Judge, composed of the following: Hon. Frank Sherwin Streeter, Dr. Morton Prince (absent), Dr. George Alder Blumer, Dr. Charles Parker Bancroft.

Appearances:

William M. Chase and Nathaniel E. Martin for Harry K. Thaw.
William M. Haggett, Official Stenographer.

10 A. M., January 7, 1914.

The CHAIRMAN: Mr. William M. Haggett has been appointed official stenographer for the Commission.

This hearing is called under the following notice:

"United States District Court for the District of New Hampshire.

CONCORD, NEW HAMPSHIRE, Dec. 31, 1913.

In re Petition of Harry Kendall Thaw for Writ of Habeas Corpus, under a Motion to be Admitted to Bail. Notice of Hearing Before Commission Appointed under said Motion.

GENTLEMEN: In the matter of Harry K. Thaw's motion to be admitted to bail, now pending in the United States District Court for the District of New Hampshire, the Commission appointed by Judge Aldrich to make certain observations and examinations and report to the Court, hereby give notice that a hearing will be held at the United States District Court Room in Concord, New Hampshire, on Wednesday the seventh day of January, 1914, at ten o'clock, A. M.

At said hearing in accordance with the order of the Court, all interested parties will be given leave to appear and offer evidence in respect to acts, if any, since the committal to Matteawan, February 1, 1908, tending to show personal violence, or any manifestations of a tendency, or disposition, to do physical harm, and evidence to the contrary."

Signed by the CHAIRMAN.

Addressed to William T. Jerome, Deputy Attorney-General of
e State of New York and other counsel for the State of New
ork; also to William M. Chase, Drew, Shurtleff, Morris & Oakes;
artin, Howe & Donigan; and William A. Stone; attorneys for
arry K. Thaw.

This notice was sent to counsel representing all the interested
arties as the Commission understood.

What appearances, if any, are to be entered?

WILLIAM M. CHASE: I appear with Nathaniel E. Martin for
r. Thaw.

The CHAIRMAN: Is there any appearance for the State of New
ork.

For the information of counsel for the petitioner and others in-
rested, the following statement is made:

About four o'clock yesterday afternoon, the Commission received
letter from Mr. Jerome, Deputy Attorney-General of the State
New York, stating, in substance, that because the scope of the
mmission's inquiry is so limited under the order of the Court, he
d decided not to appear before the Commission. His views of
e power and duty of the Commission are expressed in the fol-
wing words:

"Your power is limited by the Court to an inquiry in respect to
ts, if any, since the committal of H. K. Thaw to Matteawan,
bruary 1, 1908, tending to show personal violence, or any mani-
stations of a tendency, or disposition, to do physical harm, and
idence to the contrary.

"Such an inquiry does not contemplate an examination by you
the clinical history of the case nor a determination of his present
ental condition."

It seems obvious that Mr. Jerome greatly misapprehends the
urt's order and the scope of the Commission's power and duty
ereunder. The limitation of which he speaks is applicable only
this public hearing at which evidence may be offered as "to acts,
any, tending to show personal violence, or any manifestations
a tendency, or disposition, to do physical harm." In all other
spects unlimited powers appear to have been conferred upon the
mmission to make such observations and examinations as it sees
to make as to Thaw's present condition, and to enable it to per-
m its duty of advising the Court upon the only question sub-
tted, namely, whether Thaw's liberty on bail would menace the
blic safety.

The question whether Thaw was or is insane is only before us as
s involved in the determination of the question of menace through
granting of bail. The question of the petitioner's present men-
condition has been and will be carefully considered, and the
mmission is already in the third week of its examinations and
servations on that very point.

Late last evening the Commission wired counsel for the State of
w York, in part, as follows:

"The Commission earnestly desire the co-operation of all parties
able of furnishing evidence that may be useful in forming a basis

for its advice to the Court, and if you feel that you can produce material facts—but not opinion—bearing upon Thaw's present mental condition, in addition to those we already have, we shall be pleased to have you submit them to the Commission on Friday morning next at eleven o'clock.

"Since we have been carefully examining for many days a mass of written evidence, much of which we owe to your kindness, bearing upon Mr. Thaw's present mental condition, it is obvious that we should not be warranted in covering that ground again.

"It is equally manifest, seeing that ultimate responsibility rests upon the Commission, that mere opinion in place of facts cannot be received as a basis for our conclusion.

"That you may have seasonable notice of meeting on Friday, we wire this by night-letter. Be good enough to wire your reply tomorrow (Wednesday) forenoon."

The foregoing correctly represents the status this morning so far as counsel for New York is concerned.

The question before the Commission at this hearing is purely incidental. The Commission will receive evidence, if any, in respect to acts since the prisoner's committal to Matteawan, February 1, 1908, tending to show personal violence, or any manifestations of a tendency, or disposition, to do physical harm, and will also receive evidence to the contrary.

This is precisely in accordance with the order of the Court which the Commission is bound to follow.

From the reluctance of the counsel for the State of New York to appear on this question, the Commission may assume that such counsel have no evidence to offer upon the question which could supplement the official Matteawan hospital records, or case-book which has been very carefully examined by the Commission.

We will hear any evidence that may be offered by counsel for the petitioner on this question. The Commission will then proceed with its examinations and observations to enable it to advise the Court upon the question submitted. The Commission desires all the aid that can be furnished on this question, and if the counsel for the State of New York can render assistance by furnishing any facts additional to those which are now being examined, the Commission expresses the hope that Mr. Jerome will submit such facts on Friday next, as above pointed out. After Mr. Jerome has appeared before the Commission, if he desires to appear, and the whole examinations have been concluded and all these matters have been fully considered, the Commission hopes to make its report at an early date.

While awaiting any suggestion on the part of the counsel, the Commission would say that it regrets very much that one of its associates, Doctor Prince, is temporarily confined to the hotel by illness, but we hope and understand that it will be merely temporary.

Mr. CHASE: If the Commission please.

The CHAIRMAN: Judge Chase.

Mr. CHASE: As has been suggested by the Chairman, we understand that the case books, or case book, relating to Mr. Thaw while

n Matteawan is before the Commission and has been thoroughly examined by the Commission in part at least, and so far as his conduct while confined in Matteawan is concerned we at present rest upon the negative testimony that appears in the case book.

We have at present here today Mr. Drew and Mr. Stevens who have had the custody of Mr. Thaw since he has been in New Hampshire, and their testimony can be received as I see that Judge Aldrich of the District Court states that their testimony shall be considered. They are present in court, and we will ask them to take the stand and testify to such facts as they have in mind. Mr. Nute is absent necessarily today but will be here tomorrow forenoon at the adjourned hearing. I understand there is to be an adjourned hearing on account of the notice to Mr. Jerome. We are subject also to any suggestions that the Commission will make. We desire to aid the Commission so far as it is in our power to do so, and whatever facts we can furnish to the Commission will be cheerfully furnished upon application.

If the Commission please: I have had no conversation with Mr. Drew with reference to the matter about which he is to be interrogated, and I do not know what course the Commission will desire to have pursued—whether they would desire to question Mr. Drew. Perhaps that would be more to the point—get such information as they seek from Mr. Drew, or we will examine Mr. Drew in the light of what the Commission has said through the Chairman.

The CHAIRMAN: We think it will be convenient for the counsel to proceed with the examination and the Commission will ask such questions as they may think will aid them if the matters are not brought out on the direct questions.

Testimony of Holman A. Drew.

HOLMAN A. DREW, after being duly sworn, testifies as follows

(By Mr. CHASE:)

Q. 1. Mr. Drew, you are the sheriff of Coos County?

A. Yes sir.

Q. 2. What was your first acquaintance with Mr. Thaw?

A. I went to Sherbrooke and saw Mr. Thaw, but I did not meet him. My first acquaintance with him was on the tenth of September when I arrested him in Stewartstown.

Q. 3. And has he been in your custody ever since?

A. Yes sir.

Q. 4. Have you had him under your personal observation. How much of that time have you had him under your personal observation?

A. Well, all the time but four weeks. I was in Berlin attending court four weeks.

Q. 5. The particular point of inquiry is whether he has manifested during this time any tendency towards violence or towards doing harm to any person or thing?

A. He has not.

Q. 6. Will you state to the Commission the result of your observation in regard to these matters?

A. I have never noticed a thing. I have not seen him when he was angry at all, and I have noticed no signs of violence in Mr. Thaw.

Q. 7. Have you noticed any rising of temper or anything of that description?

A. No sir.

Q. 8. You have not?

A. No sir.

Q. 9. Have you noticed anything that would have a tendency to show that it would not be safe to the public or to himself to allow him to be at large?

A. I have not.

Mr. CHASE: I think that is all the inquiries I have to make.

(By the CHAIRMAN:)

Q. 10. Mr. Drew, will you state in a narrative way just what your relations have been with him, how you have been together and the circumstances, so as to show your opportunity for close observation on these points?

A. Well, the first week while we were at Colebrook I was with him day times, and every other night I stayed in the room with him while we were at Colebrook. Then we came down here for quite a while, I stayed in the room with him nights for quite a little while, and saw him day times, every day all the time; that is, right near by.

Q. 11. When did he come to Concord to stay?

A. He came to Concord, I think he came to Concord the eighteenth or either the seventeenth day of September.

Q. 12. To what extent have you been with him since that date?

A. Well, after we came to Concord, for some little time I stayed with him nights in his room and was with him, day times, one of us was there all the time, right there with him.

Q. 13. Who do you mean by "one of us"?

A. Either Mr. Stevens—Mr. Nute was not there at the first of it much; he was away attending court. Mr. Stevens or Mr. Nute, one of us has been with him all the time.

Q. 14. Both day and night?

A. Yes sir.

Q. 15. Were you present with him at the hearing before the Governor and Council, when the discussion was had with reference to his mental capacity?

A. There were two hearings before the Governor and Council. One hearing here before the Governor. There was one hearing here and one at Rochester.

Q. 16. Were you with him at the hearing here?

A. Yes sir.

Q. 17. You may state what occurred at that hearing with reference to charges made by counsel as to his condition?

A. Well, he was arraigned pretty severely by Mr. Jerome before the Governor and—well, very severely.

Q. 18. Was the petitioner present?

A. Yes sir.

Q. 19. What, if any, exhibitions of irritability or anger was shown on that occasion?

A. It excited him a little, but I did not see that he was angered. He didn't express anything when we returned to the hotel.

Q. 20. Have there been other occasions when matters have so happened that might disturb him—his equanimity?

A. That might?

Q. 21. Yes?

A. Yes.

Q. 22. The Commission would like to know whether or not at any time he has shown irritability or any loss of self-control?

A. No. I have never seen him—I have seen him when he was nervous and a little excited.

Q. 23. To what extent?

A. Well, he was—when I first saw him in Stewartstown he was a good deal nervous, because of course he didn't know what was going to happen.

Q. 24. How did he show it?

A. Well, he was excited. He didn't say anything that would lead me to think so as I know of, but you could see that he was nervous and excited.

Q. 25. Well, from your observation, whether he appeared more excited than a normal man would under like circumstances and conditions?

A. No, I don't think so.

Q. 26. The Commission would like an expression of your plain views on that question?

A. I don't think that he did; that is, as I understand the circumstances were.

(By Dr. BLUMER:)

Q. 27. I should like to inquire, Mr Drew, whether at any time you have noticed impulsive acts aside from those of anger, irritability and violence, something which you have already testified; in other words, whether Mr. Thaw's conduct at all times has been well ordered like that of the average person?

A. Yes sir, I think it has.

(By Dr. BANCROFT:)

Q. 28. I should like to ask you, Mr. Drew, from your knowledge of him,—of course you have seen a great deal of him,—what kind of a mental make-up you think he has. Has he got a pleasant and happy frame of mind or has he one of the aggressive suspicious minds?

A. He has been all right so far as I have seen.

Q. 29. What do you think his temperament is?

A. He is a very pleasant fellow to be with; yes sir.

Q. 30. Have you noticed any of his letter writing?
A. No, I never have seen it.
Q. 31. You never have had occasion to receive letters from him?
A. I received one letter from him after I went home to Berlin.
Q. 32. Were they well expressed.
A. Yes sir.
Q. 33. Perfectly coherent and intelligent?
A. Yes sir.

(By the CHAIRMAN:)

Q. 34. Have you the letter here?
A. No, I haven't it with me.

(By Dr. BANCROFT:)

Q. 35. How did he sleep nights. Occasionally you were with him?
A. Yes sir.
Q. 36. What kind of nights did he have?
A. He slept very well, first rate.

(By Dr. BLUMER:)

Q. 37. Have you discussed with Mr. Thaw the ordinary happenings of the day?
A. Yes sir.
Q. 38. What would you say with reference to his insight?
A. I think he has quite a wonderful insight into things, a great deal better than the ordinary man, I think.

(By Dr. BANCROFT:)

Q. 39. You mean into the affairs of the day, what is going on, business, politics?
A. Yes sir.
Q. 40. You never knew him to express any unusual or strange opinions—unusual opinions about ordinary affairs?
A. No sir.

(By the CHAIRMAN:)

Q. 41. Mr. Drew, upon this commission is thrown the responsibility of advising the Court upon an important question. If you know anything or any further fact that would aid the Commission in reaching a correct conclusion, a sound conclusion on that question, we would be glad to have you state it, if you know anything that has come to you out of any of your relations with Mr. Thaw since last September?
A. I do not, sir, not a thing.

(By Dr. BANCROFT:)

Q. 42. Mr. Drew, in reference to his relations with the sheriff—I mean with those who had him in charge, in custody, was there any attempt to do anything underhand?
A. Not a thing; not a thing.

(By Dr. BLUMER:)

Q. 43. What have you got to say, Mr. Drew, from the point of view of Mr. Thaw's sense of importance. Has there been what is called an exaggeration of the ego that you have noticed?

A. No.

Q. 44. No disposition to attach undue importance to himself and his affairs?

A. No sir.

The CHAIRMAN: Unless the counsel desire to put further questions that is all the Commission cares to examine.

Mr. CHASE: We do not desire to ask any further questions of Mr. Drew.

Testimony of Clark D. Stevens.

CLARK D. STEVENS, after being duly sworn, testifies as follows:

(By Mr. CHASE:)

Q. 1. Mr. Stevens, where — you reside?

A. In Concord.

Q. 2. You are on the police force?

A. Yes s'r.

Q. 3. When did you first make the acquaintance of Mr. Thaw?

A. On the morning of the eighteenth of September.

Q. 4. What privilege have you had with his since?

A. I have been present with him every day since, with the exception of a few nights.

Q. 5. Have you slept in the same room with him?

A. Yes sir.

Q. 6. How intimate has been your observation of him during this time?

A. Well, I don't see how anyone could be more intimately connected with him. I have walked with him and eaten with him and slept with him; in fact, been with him most of the time, as I say, since the eighteenth of September.

Q. 7. Have you made trips onto Kearsarge?

A. Yes sir.

Q. 8. And about Concord?

A. Yes sir.

Q. 9. Walking?

A. Yes sir.

Q. 10. Have you walked with him a great deal?

A. I don't know—I couldn't say how much on an average, but from three to eleven miles.

Q. 11. A day?

A. A day; nearly every day; once in a while we didn't get out on account of stormy weather, or something of that sort.

Q. 12. You walked one day to the extent of eleven miles?

A. Yes sir.

Q. 13. On these excursions have you discussed various subjects?

A. Yes sir.

Q. 14. Talked them over?

A. Yes.

Q. 15. You have been present also when he has had conferences with his counsel and others?

A. I have.

Q. 16. Resulting in all of these relations?

A. Yes sir.

Q. 17. Have you been on rides with him in automobiles when his mother has been present?

A. I have, yes sir.

Q. 18. And his friends?

A. Yes sir.

Q. 19. What do you say about there being any tendency—whether you have noticed any tendency on his part towards harmful conduct towards those that he is thrown in company of?

A. Quite to the contrary, sir. I have never seen anything of the kind.

Q. 20. What is his disposition?

A. I have found Mr. Thaw to be a perfect gentleman ever since I have been connected with him.

Q. 21. What can you say about his temper?

A. I have never seen any signs of it, sir, since I have been with him.

Q. 22. Were you present at Concord before the Governor and council?

A. Yes sir.

Q. 23. When he was criticised very sever-ly by Mr. Jerome?

A. I was.

Q. 24. And also at Rochester?

A. Yes sir.

Q. 25. What was the nature of Mr. Jerome's attack upon him?

A. He berated him very severely, I should say.

Q. 26. How did Thaw take it as compared with a sane man?

A. A great deal cooler, sir, than I could.

Q. 27. I do not understand what you say?

A. A great deal cooler than I could have done.

Q. 28. Have you ever seen any excitement on his part?

A. I never have, no sir.

Q. 29. In the discussions which you had with reference, I suppose, to the events of the day, you have had discussions?

A. A great many, yes sir.

Q. 30. How does he hold up his side of the question?

A. I should say wonderfully. I wish I had his power of doing so, or his ability rather, perhaps.

Q. 31. Has he a pleasant disposition?

A. Very much so.

(By Dr. BLUMER:)

Q. 32. One question to ask, Mr. Stevens: Have you at any time noticed in Mr. Thaw's conduct or in his manner anything that would mark him out as a man different from the average person of your acquaintance?

A. No sir, I have not, except I think he is a great deal more kind-hearted than a great many of my acquaintances.

Q. 33. Have you noticed at any time any impulsive acts?

A. I have not, no sir; quite to the contrary.

Q. 34. Deliberate?

A. I don't think I quite understand.

Q. 35. Impulsive as meaning, as contrasted with deliberate?

A. Very kind-hearted indeed.

Q. 36. Whether or not he has acted or spoken on sudden impulse?

A. Oh, I have never noticed anything of that kind, no sir.

(By Dr. BANCROFT:)

Q. 37. The question has been asked before, and I would like to ask you, have you ever seen anything about him that implied that he was extravagantly egotistical, had an exaggerated opinion of himself?

A. No sir, I never have; never.

Q. 38. You say you have slept in the same room with him for a long period of time. How has his night been, his rest?

A. Very good, sir, better than mine a great deal.

Q. 39. He seemed to worry over the——?

A. Not at all.

Q. 40. Affairs that have confronted him?

A. No sir. I have often remarked that I didn't see how he could take it so coolly.

Q. 41. You felt perfectly safe when you went to bed?

A. Yes sir, perfectly safe.

Q. 42. I would like to ask you, Mr. Stevens, if you yourself personally have had any letters from him?

A. I have not, no sir.

(By the CHAIRMAN:)

Q. 43. Mr. Stevens, you understand the question that is before the Commission?

A. Yes sir.

Q. 44. Whether if Mr. Thaw were out on bail he would be a menace to the public. You understand something of the nature of the responsibility of the Commission?

A. Yes sir.

Q. 45. I want to ask you to reflect and tell us with candor if there is anything you have observed in Mr. Thaw's demeanor, his conduct, his speech, or his way of thinking as shown by your conversations, which would aid the commission in arriving at a sound conclusion. I mean anything other than what you have already said.

A. I have never noticed anything, any signs of violence in Mr. Thaw since he has been with me. As I say, contrary to that I have noticed a lot of little acts of kindness, sir, lots of them. If you would like to know something of them, I could tell you.

Q. 46. We do not care to go into details about that. Whether you have observed any signs of unusual irritability, on his part?

A. No sir.

Q. 47. Or exhibitions of temper?

A. No sir.

Q. 48. In speaking of men and possibly women with whom he has formerly had relations, you may state what, if anything, he has ever said indicating enmity toward any of those people?

A. I never have. I never heard him.

Q. 49. With reference to his wife, you may state what, if anything, you ever heard him say indicating an unkind or angry feeling against her?

A. That subject has never been brought up between Mr. Thaw and myself

Q. 50. With reference to any public officer who has had to do with his detention?

A. No sir.

Q. 51. During the last five years—you may state whether he has ever said anything to indicate feelings of anger or resentment?

A. I have never heard him say a word against any officer or lawyer that has been against him since he has been with me.

(By Dr. BLUMER:)

Q. 52. The term common sense has a generally accepted meaning. I should like to inquire of you whether Mr. Thaw has shown common sense in all his relations with you?

A. Yes sir, he has.

The CHAIRMAN: The Commission have no further questions.

(By Mr. CHASE:)

Q. 53. There is one question that I will ask Mr. Stevens, and that is this: Whether you have noticed anything in Mr. Thaw's conduct or conversation which has a tendency to show that it would be unsafe to the public for him to be at large?

A. I never have, no sir.

Mr. CHASE: That is all.

The CHAIRMAN: That is all.

The CHAIRMAN: Has the counsel for the petitioner any further evidence to offer other than that of Mr. Nute who has the permission of the Commission to be absent this morning?

Mr. CHASE: We could produce cumulative evidence similar to that which has been produced this morning, but in view of the situation it does not seem worth while. Mr. Nute and Mr. Pelren, who has been on very intimate relations, as the Chairman knows, with Mr. Thaw, will be here tomorrow, and if the Commission should desire to hear further testimony of a cumulative nature, we can produce, I presume, a large amount of it.

The CHAIRMAN: Counsel will have to determine that course for themselves.

Mr. CHASE: From the situation, as counsel, I should assume that it would be unnecessary, and we would not attempt to trouble the Commission with anything excepting Mr. Nute and Mr. Pelren, unless some other development arises in the future.

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The CHAIRMAN: At the request of Mr. Nute made several days ago, he was excused from appearing until either tomorrow or Friday, and the Commission told him they would hear him upon his return.

With reference to Mr. Jerome's conference with the Commission or appearance before the Commission if he desires to appear the understanding of the Commission in sending Mr. Jerome the telegram and letter was that he would come before the Commission at their office here in an informal way on Friday, if he desired, but it was not intended to keep this hearing open for the reason that Mr. Jerome did not care to appear upon the question which was open under the order of the court at this hearing. The Commission will take the statements of Mr. Nute and Mr. Pelren, if desired, at the office where they are conducting their examinations, and if there is nothing more to be presented here, this hearing will be adjourned without date.

Has any other interested party or any citizen anything to suggest upon the question that is now before the Commission as to any acts of violence of Mr. Thaw or manifestations of a tendency to do physical harm? If there are, an opportunity will now be given them to present any facts.

Mr. CHASE: May I enquire whether you desire the attendance of Mr. Thaw's counsel tomorrow?

The CHAIRMAN: We are proceeding with the personal examinations of Mr. Thaw which have been going on for the last three weeks, and we will notify counsel if their personal presence is desired.

If there is nothing further to be offered, this meeting will be adjourned without date.

Testimony of Eugene P. Nute.

Hearing at the Office of Honorable Frank S. Streeter.

1.40 P. M., January 9, 1914.

Present: William M. Chase, Counsel for Mr. Thaw.

EUGENE P. NUTE, after being duly sworn, testifies as follows:

(By Mr. CHASE:)

Q. 1. When did you first make the acquaintance of Mr. Thaw?

A. The fifteenth day of September, sir.

Q. 2. State in a general way what you have seen of him since?

A. Since the sixteenth of September he has been in the joint custody of Mr. Drew and myself, and I have not been with him quite half the time. I have not been with him really as much as Mr. Drew, and whenever it wasn't possible for Mr. Drew to be present, why I have been here.

Q. 3. Have you slept in the same room with him?

A. Never but once; that is the first night, the night of the sixteenth of September I slept in the same room with him.

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Q. 4. You have observed him carefully while you have been with him?

A. Yes sir.

Q. 5. What did you see about discovering any tendency to cause harm to anybody?

A. None whatever that I am aware of. I have never seen him show anything that would indicate to me he was an unsafe man anywhere.

Q. 6. State whether you have seen anything that would indicate he would be a menace to the public if at liberty?

A. None whatever, sir.

Petitioner's Application for Hearing on Motion for Admission to Bail.

[Filed January 13, 1914.]

Now comes Henry Kendall Thaw and respectfully requests this Honorable Court to appoint a time for a hearing on the report of the Commission appointed by this Honorable Court, to advise the Court whether said Thaw's liberty under bail would be dangerous or a menace to public peace and safety, and if the report shall be accepted and adopted, to determine and fix the amount of bail, and make such further order as may be necessary.

HENRY KENDALL THAW,

By His Attorneys,

WM. M. CHASE,
W. A. STONE,
MARTIN, HOWE & DONIGAN,
DREW, SHURTLEFF, MORRIS & OAKES.

Petitioner's Request for Extension of Time for Filing Brief.

[Filed January 13, 1914.]

Now comes your petitioner, Henry Kendall Thaw, and respectfully represents that his counsel, by reason of other engagements, have been unable to file his brief within the time appointed by this Honorable Court, and he respectfully urges this Honorable Court to grant an extension of thirty days for the filing of said brief.

HENRY KENDALL THAW,

By His Attorneys,

WM. M. CHASE,
W. A. STONE,
MARTIN, HOWE & DONIGAN,
DREW, SHURTLEFF, MORRIS & OAKES.

Rescript.

[January 15, 1914.]

ALDRICH, *J.*:

I do not think I ought to grant the petitioner's application for a thirty days' extension of time in which to file briefs, but in view of the engagements of counsel set forth, and the importance of the questions involved in the main case, an extension of twenty days is granted.

All questions under the motion for bail and all questions in respect to the report of the Commission as to Thaw's present mental condition, are postponed until the final hearing upon the questions involved in the habeas corpus and extradition proceedings.

Petitioner's Application for Hearing on Motion for Admission to Bail.

[Filed February 2, 1914.]

Now comes Henry Kendall Thaw and respectfully moves that this Honorable Court shall appoint a time for a hearing on the report of the Commission appointed by this Honorable Court to advise the Court whether said Thaw's liberty under bail would be dangerous or a menace to the public peace and safety; that said report shall be accepted and adopted; and that the amount of bail be fixed and determined; and for any further order pertaining thereto as may to this Honorable Court seem necessary.

HENRY KENDALL THAW,

By His Attorneys,

WM. M. CHASE,
W. A. STONE,
MARTIN, HOWE & DONIGAN,
DREW, SHURTLEFF, MORRIS & OAKES.

Petitioner's Application for Hearing.

[Filed February 2, 1914.]

Now comes Henry Kendall Thaw and respectfully moves this Honorable Court to appoint a time for a hearing in the above entitled matter.

HENRY KENDALL THAW,

By His Attorneys,

WM. M. CHASE,
W. A. STONE,
MARTIN, HOWE & DONIGAN,
DREW, SHURTLEFF, MORRIS & OAKES.

Petitioner's Motion to Admit Evidence on Question of Bail.

[Filed February 19, 1914.]

Now comes Henry Kendall Thaw and asserting his constitutional right upon his application for bail to introduce evidence as to his present mental condition, respectfully asks leave to call as witnesses, as to his present mental condition, certain specialists and alienists who have recently examined the said Thaw pertaining thereto.

WILLIAM A. STONE,
WM. M. CHASE,
MARTIN, HOWE & DONIGAN,
DREW, SHURTLEFF, MORRIS & OAKES,
Attorneys for Henry Kendall Thaw.

Dated, February 19, 1914.

Order of Court.

[February 21, 1914.]

ALDRICH, *J.:*

Ordered that the respondent have ten days in which to file supplemental brief and that the petitioner have ten days thereafter in which to reply.

By the Court:

BURNS P. HODGMAN, *Clerk.*

Motion of State of New York for Extension of Time for Filing Brief.

[Filed March 4, 1914.]

New York moves for an extension of time for five days in which to file briefs.

BERNARD JACOBS,
Of Counsel for State of New York.

Order of Court.

[March 4, 1914.]

ALDRICH, *J.:*

Upon consideration of the motion of the State of New York it is ordered that the time for filing its brief be extended five days.

By the Court:

BURNS P. HODGMAN, *Clerk.*

Petitioner's Motion for Extension of Time for Supplementary Brief.

[Filed March 23, 1914.]

Now comes the petitioner and shows that the time for filing his supplementary brief under the order of February 21, 1914, expires on March 24th; that counsel have prepared such a brief and that it is in the hands of the printers; that the brief is of considerable length and the printers will not be able to have it in proper form before Friday morning, the 27th inst.

Wherefore, your petitioner moves that the time for filing such printed brief with the Clerk be extended to and including March 27, 1914.

HARRY K. THAW,
By His Attorneys,
MARTIN & HOWE.
JOSEPH DONIGAN.

Order of Court.

[March 24, 1914.]

ALDRICH, *J.:*

Upon motion of petitioner, it is ordered that the time for filing his supplemental brief under the order of February 21, 1914, be extended to and including March 27, 1914.

By the Court:

BURNS P. HODGMAN, *Clerk.*

Opinion.

(April 14, 1914.)

ALDRICH, *J.:*

In this case the person sought to be returned to the demanding state of New York under the Federal Constitution, which provides for extradition upon a charge of crime, is, in fact, a fugitive from a decree of custody under which at the time of his flight he was being held as an insane person; and the questions involved in his habeas corpus proceeding are entirely new to both English and American jurisprudence.

The question here is not the general question whether the petitioner should be returned to New York custody, but the specific question whether the process under which he is sought to be returned is due process in the constitutional extradition sense.

The status of New York in respect to the situation is not that of a prosecutor for crime in the sole and ordinary extradition sense, because the relationship of guardian and ward is the foundation upon which the entire proceeding is based, and because, as claimed,

extradition is sought, first, for punishment for the misdemeanor involved in the alleged plan of escape, and second, for recommitment to guardianship custody at Matteawan.

This proceeding is in no sense whatever based upon the idea of recovering the person of Thaw for the purpose of punishing him for the offense of killing White, for which he was acquitted; because, as is axiomatic, and because, as expressly decided by the Appellate Division of the New York Supreme Court in Peabody v. Chanler (117 N. Y. Sup. 322, 325), which was one of the Thaw cases, "there can be no punishment for him who has been acquitted."

So we have the case pure and simple, and that is all there is of it, of a person sought to be extradited under the Constitution because he has fled from guardianship custody based upon the verdict of a jury that he was insane. The person was committed on the ground of insanity, and was being held under the same commitment at the time of the alleged escape and flight.

The case is a novel one, and requires the utmost caution, as the power of extradition is exceptional and extremely arbitrary, and because it imposes itself upon personal liberty, and because heretofore neither in this country nor in England has extradition power been invoked for the return of a person fleeing from custody based upon such a finding of insanity and such an escape and flight.

Without elaborating upon particular reasonings and judicial decisions since extradition began, it may be said that heretofore, no one has ever claimed that extradition operated otherwise than in the strict field of crime, where the crime is described with a particularity and legal certainty answering the requirements of criminal pleadings, and where upon the face of the papers there was no open question as to the criminal responsibility of the person sought to be extradited. The proposition here is that the power of extradition should operate because, as was claimed in oral argument, contrary to what appears on the face of the papers, it can ultimately be shown in New York that the person sought to be extradited had sufficient mental appreciation to know that his escape was wrongful. Such is not only a novel proposition in the extradition sense, but is one fraught with dangerous possibilities, because if it is once established that you may extradite for crime a person who, as appears on the face of the papers, has escaped from guardianship custody based upon a finding against him as an insane person, upon the idea that the demanding state may ultimately prove him sufficiently sane to be a criminal, the principle is established that extradition may operate in the field of uncertainty, and as a result it would follow that you might extradite for crime an irresponsible infant who escaped from guardianship custody, or an idiot who escaped from a decree of custody based upon idiocy and indigency, as well as an insane person, upon the theory that you may subsequently, at some time and in some remote part of the country, prove that they had sufficient sense to know that the escape was unlawful and consequently that they were subject to extradition as criminals; and failing ultimately to show criminal responsibility, it results that the

person, though irresponsible, stands as a person extradited for crime under the power of the Constitution.

Thus in view of the large sense in which the proposition involved concerns the public, because of its possible application to children of tender years and idiots and other helpless and irresponsible persons, as well as the insane classes charged with crime, the question becomes one of far greater importance than the interests of the state of New York to have possession of this particular person, or the consequences which may come to this particular petitioner through a decision one way or the other.

It is because the question here is a new one and one which has a public phase, in the sense that it relates to a principle which, once established, will operate upon great classes of individuals, that it becomes a question of greater gravity than one which affects only the rights of the immediate parties concerned; and it was in this sense that Lord Justice Sir William Millbourne James, in Pooley v. Whetham, 15 Ch. D. 435, 440, said, in speaking of extradition and how it should operate, that the more important question was the public question, apart from the importance to the individuals concerned, and that if the process of extradition was abused through using it for improper purposes, a party should be discharged independently of any extradition act or any other act in the world.

The practical exercise of the power of extradition having been delegated to the states under the Federal Constitution and acts of Congress, the responsibility of the Federal government is limited to the question whether, in a given case, the escape and flight constitutes a fleeing from justice in the constitutional and statutory extradition sense, and the further question whether the supposed crime is substantially and legally charged.

As the source of extradition power of states is Federal, and as it relates to crime only, and contemplates the exercise of exceptional and arbitrary control in restraint of personal liberty, the Federal Constitution and acts of Congress have reserved to the Federal government and imposed upon its courts the very important duty of seeing that the power is exercised upon due and appropriate process, and that it shall not be extended to fields and exercised in classes of cases not clearly intended by the Constitution.

The power of restraint of liberty and of personal delivery under extradition process is arbitrary and exceptional, because a person may be taken into custody in one jurisdiction and conveyed to another without a hearing before the governor, and, as said in New York in comparatively recent opinion by Mr. Justice Cullen in Corkran v. Hyatt (172 N. Y. 176, 193; approved by the Supreme Court, 188 U. S. 691); "Unless he may review his extradition on habeas corpus, a citizen, on the fiat of an executive officer, without a hearing, may be transported a prisoner to the utmost confines of the country." And earlier the New York Supreme Court in People v. Donohue (84 N. Y. 438, 441), in maintaining that suitable preliminary papers were essential in extradition proceedings, and that the right of review exists when judicial investigation and the judgment of

the law are invoked, said "To say they are not would be to disregard the law and make the executive an autocrat."

In exercising the power of interstate extradition, states are using a Federal force, and although there has been a world of discussion as to the scope of the revisory power reserved to itself by the Federal government, it may now be accepted as unquestionably established that in cases which reasonably present the question of the proper exercise of the constitutional power, it is not only the right, but the duty of the United States courts to see that the right is exercised only in respect to such classes of cases as were contemplated when the power was granted, and that the crime is substantially and legally charged.

It may also be accepted as established that, as the practical administration of the arbitrary and exceptional power is at variance with the principles of the common law, and as it relates to crime, the charge of crime must be supplemented by a description answering the rules in respect to particularity and certainty.

Looking at the subject of extradition historically, it will be seen that all efforts to extend the power inconsiderately to new situations and to include new classes of cases have been stubbornly opposed both in England and in this country. Reluctance to go beyond the offences expressly enumerated in our constitutional provision, and situations found to have been reasonably intended by the general word "crime" has been many times manifested by executives, and many times by courts charged with responsibility for the exercise of revisory control.

Without going much into the history of the contentions in respect to limitations and extensions under judicial and executive construction, the opposition to extension of power under liberal construction is in a measure illustrated by such instances as the slave cases of Governor Seward in New York, where it was contended that no state was bound to extradite unless the crime described was recognized as such in its jurisdiction; the case of Mr. Storey, editor of the Chicago Times, sought to be extradited to Wisconsin from Chicago for libel published in the Times at Chicago, and circulated in Wisconsin, upon the theory of a constructive flight, (3 Central Law Journal, 636); the case of Max Juhn, merchant of Baltimore, demanded by the state of New York for obtaining goods under false pretences (2 Moore's Extradition, § 585); and the case of Mitchell, where New Jersey asked New York to return Mitchell, who while in New York instigated the burning of buildings at Jersey City, whereby life was lost, and manslaughter was charged, and where the doctrine of constructive presence was urged in order to make out a case of flight. Governor Hill denied the application, quoting from Spear (page 400) that, no matter what the consequences may be, "the Governor of a State is not to become an official kidnapper in order that the guilty may be punished." (4 N. Y. Crim. Rep. 601.) And numerous other cases where extradition was sought to be carried to new situations.

In connection with the above case Governor Hill promulgated a careful set of rules in respect to applications for extradition, which

require, among other things, a concise definition of the crime, that the application shall be accompanied with an affidavit that it is made in good faith and for the sole purpose of punishing the accused. (4 N. Y. Crim. Rep. 604.)

In the early stages of interstate extradition, as is well understood, it was strenuously maintained by judges, executives and publicists that the word "crime" in the Constitution only included offences of the higher grades; but it is assumed for the purposes of this case that it may now be said with tolerable exactness that, as between the states, all penal offences, misdemeanors as well as crimes, are covered by the power delegated by the Federal Constitution, and that the only question for a Federal Court in a habeas corpus proceeding like this is the one of due process; and that under the general question of due process are the subsidiary ones whether crime is charged and described with legal certainty against a responsible person, which is a question of law, and the question of flight, which is a question of fact, and that in a case where there is no evidence dehors the record upon the question of flight involved, that all these questions must be determined upon the face of the papers. The papers, therefore, must show what the Constitution contemplates, a responsible person, a charge of crime, which under the decisions must be supplemented by a clear and complete description of the crime, and a fleeing from justice.

It is also thought to be perfectly justifiable, for the purposes of the question now under consideration, to assume that if, upon the face of the papers, a person, without suggestion of criminal irresponsibility, is named and charged with a crime which, being described, can be seen to be a crime under the laws of the demanding state, and the description of the person and the crime being supplemented by a charge of flight, that extradition follows automatically, so to speak, under executive authority; in other words, that the constitutional provision, upon such papers, operates ex proprio vigore.

The wisely efficient potentiality of the constitutional power of extradition results because extradition follows automatically and as of right, without investigation, in cases where all the contemplated elements of crime distinctly and unquestionably appear upon the face of the papers; and it is because of such automatic and arbitrary power exercised at variance with common law principles (Piggott on Extradition, page 5; Biron & Chalmers on Extradition 1-14), that the constitutional force should not be extended to indifferent and uncertain situations in respect to which the executive is not in a position to investigate the merits.

It is because extradition involves such a drastic and unchallengeable power that all the text-books, both English and American, and all the cases, hold to rules of strictness in respect to the description of the crime, and to rules of strict construction upon questions of intendment in respect to what is shown upon the face of the papers.

In order to have extradition, there must be a person, a crime, and a flight. The constitutional word "charged" must be supplemented by a description of the crime charged, and the description must be certain and complete. There must be a person, and, under a reasonable and necessary construction of the Constitution, the person

must be a responsible person; and there must be a flight, and t
flight must, according to Bouvier, be one to avoid punishment f
the crime committed.

It must be borne in mind that all of the elements necessary to c
tradition must appear upon the face of the papers; but naming
person who is charged would of course be supplemented by t
presumption of responsibility, and would be sufficient to establi
the constitutional elements unless the description of the person a
the crime for which he is sought to be extradited involves somethi
which reasonably overthrows the essential presumption of respon
bility.

In setting out its case for extradition, the state of New York d
scribes a person escaping from a custody based solely upon the fin
ing of a jury that he was guiltless of crime by reason of insanit
and the crime alleged as the ground for extradition is a conspira
to escape from a custody based only upon the finding of insanity a
commitment thereon. According to English and American autho
ties, such a finding not only overthrows the presumption of r
sponsibility, but continues the presumption of insanity until it
proved to have ceased; and the burden of proving recovery or
lucid interval, as the case may be, lies on the person alleging t
same. 19 Halsbury's Laws of England 407, and note *k*, and Lan
don v. The People, 133 Ill. 382; 27 Cent. Dig. (§ 6) 2461; Id. (§ 3
2502-2507.

It is of course true that requisition papers, fair upon their fa
even though containing nothing in the charge of crime or
the description of the person suggesting criminal responsibility, e
brace the constitutional elements, and are operative because eve
person is presumed to be sane and responsible until the contra
appears (27 Cent. Dig. 2458 and authorities cited), but papers whic
in the description of the person and of an alleged crime involv
in an escape from control because of a finding of insanity a
criminal irresponsibility, do not embrace the constitutional elemen
and are not operative because insanity and criminal irresponsibili
being proved, are presumed to continue until the contrary appea
(Id. 2462.)

The constitutional force is thus inoperative because it was nev
intended that it should be used against a person by a demandi
state whose papers show upon their face that the person sought
presumptively irresponsible. It is anomalous to say that it was ev
intended that the constitutional provision should operate upon pe
sons described by a demanding state in extradition requisition pape
either as idiots, insane persons, or as irresponsible infants; and this
because mental condition and criminal responsibility in such situ
tions are always and necessarily in the field of uncertainty and doub
and therefore it results that a crime is neither legally nor su
stantially charged within the meaning of the Constitution.

It is apparent that the English authorities hold rigidly to the ru
of strict construction in respect to intercolonial extradition and
extradition between the different parts of the British dominions, o
as it is called there, "return of fugitive offenders," and to the ide

as shown in Pooley v. Whetham, 15 Ch. D. 435, and other cases, that extradition or forcible return was only intended to operate in clean-cut cases of crime, and if used for ulterior purposes that it was an abusive use.

So cautious was England in respect to her laws in restraint of personal liberty, that her parliament, in the various Fugitive Offenders Acts, fashioned closely after our system of constitutional interstate extradition, limited them in operation strictly to the field of crime; expressly provided that return should not operate until the alleged offender had had fifteen days in which to test his liberty rights on habeas corpus; and that proceedings might be dismissed for bad faith, or because of an offence being trivial. See, among the English statutes, 6 & 7 Vic. c. 34, page 194; 33 & 34 Vic. c. 52, page 288; 44 & 45 Vic. c. 69, page 392. See also Biron and Chalmers on Extradition, pages 90-132; Clarke on Extradition, page 42; Act of 1870, s. 26; Halsbury's Laws of England, vol. 14, pages 403, 405, 413, and note *n*.

So far removed was England from the idea of using extradition for the return of escaped lunatics upon a charge of crime, that it never used the power in such a situation or for such a purpose, but wisely provided other and different means which presented opportunities for judicial investigation and for safeguarding the rights and interests of all; as, for instance, see the Lunacy Act of 1890, 53 Vic. c. 5, s. 86, 89. See also the Laws of England, by the Earl of Halsbury, vol. 19, page 525 and notes. Moreover, and even after the Fugitive Offenders Act of 1843, which was manifestly intended to operate only upon responsible parties, remedy under habeas corpus, or through an application to commissioners, was suggested as the appropriate remedy for the restoration of an insane person escaping from guardianship asylum. See Norris v. Seed, 3 Exch. Rep. 782, 790, 792.

New York's right of custody, if the right exists, was based solely upon the idea of insanity; and, from the very nature of the case, in describing the supposed extradition crime the demanding state itself, upon the face of the papers, necessarily throws the question of criminal responsibility into the field of uncertainty, and thus it at once presents a question new to extradition law.

Careful research finds no case in this country or in England where the extradition power has been sought to return a person whose flight was from custody of such a character. The fact that among nations flights from insane hospitals, idiot asylums, and institutions for the care of indigent children of tender years, have never been suggested as subjects proper to be covered by international treaties, is a fact which at least historically establishes the proposition that they have never been deemed proper subjects of extradition. The fact that the return of fugitives from such custody has never been sought in this country through the instrumentality of constitutional interstate extradition based upon alleged crime involved in escape, is strong evidence in favor of an interpretation that the constitutional provision was never intended to operate in such a field of uncertainty. The very fact of custody on the ground of

infancy, idiocy, or insanity suggests irresponsibility; and it is probably perfectly correct to say that no one having to do with the creation of the constitutional provision ever dreamed of its operating upon infants, idiots, and insane persons. Are the exigencies of a case like this such as to justify extending its operation into fields into which it was never intended to enter?

Looking, as we must, in respect to the question of crime to the face of the papers only, in a situation where the presumption of responsibility is absent, do the papers show prima facie a case of criminal responsibility, or do they show prima facie insanity or criminal irresponsibility? Do not the requisition papers and the indictment in referring to the escape and the process of custody under which the person was held, including the description of the status of the person, affirmatively introduce on the face of the papers a fact or a personal status which shifts the presumption of responsibility to one of irresponsibility, or at least a status which creates or suggests the element of uncertainty in respect to the presumption of criminal responsibility? Is the charge, which must be one of perspicuity and of particular recital of facts (Spear 250), under the description taken as a whole, left as a substantial charge with legal certainty in the extradition sense? Do not the necessary recitals of the demanding state necessarily leave the charge of crime incomplete? It is because executive extradition involves the forcible seizure of a person and without a trial carrying him from one jurisdiction to another, and perhaps a remote one, and upon a proceeding in which he is not entitled to be heard, that the rule of strict particularity, certainty, and completeness in describing the crime has been thoroughly and completely established by abundant judicial authority as a reasonable and necessary rule of protection of personal liberty. And with this goes the other rule now unquestioned, that unless the crime is substantially charged, and unless the description sets forth with strict legal exactness and completeness a crime known to the laws of the demanding state, there is no constitutional authority to extradite.

Substantially charged means legally charged, and these rules have reference, not to the general charge of crime alone, but to the description which must supplement the charge, and include, of course, both a description of the person and the crime. Thus it follows in this case in a very substantial sense, both in respect to the constitutional word "person" and the constitutional word "crime" that the real question is whether in the legal and substantial sense the papers upon their face, under reasonable interpretation, show prima facie crime and criminal responsibility; or whether they show prima facie legal uncertainty, in respect to the necessary element of criminal responsibility.

The statement of Judge Hough in the Kopel case (148 Fed. Rep. 505, 506), quoting Judge Cullen in the Corkran v. Hyatt case (172 N. Y. 176, 182), that "no person can or should be extradited from one state to another unless the case falls within the constitutional provision, and that the power which independent nations have to surrender criminals to other nations as a matter of favor or comity

is not possessed by the states," is a good statement of the legal character of the interstate power and of the interstate relations, and is one which is abundanly supported by the legal literature on the subject. (See also Hyatt v. Corkran, 188 U. S. 691.)

In the same line is the reasoning of Lord Alverstone in respect to the English Fugitive Offenders Act (Ex parte Percival, 21 Cox. Cr. Cas. 387):

"I think that every person who comes and asks for a fugitive offender to be delivered up under that statute must be prepared with evidence to show that that condition of the statute has been fulfilled. I think that is a very important matter, having regard to the fact that we are dealing with the criminal law, and that we must apply the general principles of the criminal law and require that the prosecutor must make out his case. We are dealing with the liberty of the subject, and with a branch of the criminal law which affects the liberty of the subject, and I therefore think that that condition should under ordinary circumstances be clearly fulfilled."

It was early discovered that oppressions would result if a simple charge of crime was recognized as the only thing necessary to put the constitutional function of extradition into operation; and it followed that the Supreme Court declared in Roberts v. Reilly (116 U. S. 80, 95), that before the governor of a state can lawfully comply with the demand for the surrender of a person it must appear that the person demanded is substantially charged with a crime against the laws of the demanding state, and that the person demanded was a fugitive from the justice of the demanding state. The fundamental idea thus expressed by the Supreme Court has been recognized as meaning legally charged, and legally charged has been interpreted by numerous judicial decisions and text-book writers as meaning such particularity, perspicuity, and completeness of recital as will enable the executive upon whom the demand is made to see that the facts constitute with reasonable certainty a crime against the laws of the demanding state.

It must be perfectly correct to say that uncertainty appearing upon the face of the papers in respect to the material element of mental condition and criminal responsibility would be as fatal to the idea of the constitutional right of extradition as would uncertainty as to a physical fact which was a necessary element of the crime sought to be described.

The right of a state to have possession of a person through extradition, not for the sole purpose of punishing him for crime, but ultimately to protect a community from which he has fled, is not an inherent or fundamental right, nor is it one which would be classed with the essential or substantial rights of a state. The right of a state to exercise guardianship control rests in the parens patriæ doctrine, and in its brief the state of New York recognizes the relationship of guardianship and ward.

A very careful examination of the numerous American text-books on international and interstate extradition, and of the very numerous decisions by American courts, and of the many writings of publicists, and of the works of the English text writers, and of the

English decisions in respect to international extradition, and the
turn of fugitives under the various English Fugitive Offenders
discloses no suggestion of the return of a person fleeing from g
dianship custody based upon a decree or finding of insanity, idi
or infantile irresponsibility, or from process in the nature of
process invoked for parental and protective purposes, upon the the
that the escape involved an extraditable crime, save the single cas
Amelia Leonard, an insane person, who was being held by New Y
in order that proceedings might be instituted for extradition u
requisition from the executive of Massachusetts, and where hal
corpus was sustained by Judge Seabury and the petitioner discha
as not an extraditable person.

So the question here for the first time is whether extradition s
enter broadly into a new field, with whatever consequences
follow from its arbitrary and exceptional character, and assert it
in behalf of a demanding state where the flight of which it c
plains is from a control under the doctrine of parens patriæ
from a control which as shown by the requisition papers was ba
upon mental incapacity and personal irresponsibility. Surely co
will be reluctant to blindly or inconsiderately so extend an arbitr
and exceptional body of law, unless under pressure of extreme ne
sity and the absence of some mode of return more consonant w
the idea of reasonable opportunities for looking to the merits
of protecting personal liberty. All personal restraint and cust
exercised under the doctrine of parens patriæ, or of state guardi
ship, is of course based upon the idea of mental incapacity as
tradistinguished from physical incapacity. It is the existence
mental incapacity that justifies the control, and it is quite cor
to say that all decrees and commitments effectuating such righ
control, whether based upon insanity, idiocy, or infancy, re
mental incapacity, without undertaking to define its degree; and
the function of the Federal court in extradition is only to see t
there is due process and a flight, and as apparently the executive
a state has no suitable power or machinery in an extradition p
ceeding for hearing the parties and, upon a proper hearing,
ascertain the degree of mental capacity or incapacity, it wo
result, though incapacity appears on the face of the papers p
sented by the demanding state, that upon a technical and ex pa
charge and description of a crime that extradition power wo
operate perfunctorily alike upon all degrees of insanity, idiocy a
infancy.

No one would contend that if the degree of idiocy or insanity
in fact such that the escaped person did not know east from w
and merely wandering from hospital control in New Hampsh
landed in Maine, he ought, upon a charge and description of cri
to be extradited as a criminal; yet if it be true that the constitutio
power of extradition operates perfunctorily and arbitrarily un
papers affirmatively showing the incapacity upon which the con
of idiots, infants, and insane persons was based, he must be return
as a criminal, because there is no recognized machinery in the in

state extradition system for ascertaining the degree of mental responsibility.

The possibility that the constitutional right or power may be so anomalously exercised in cases involving personal liberty, and upon lines so entirely inconsistent with and so at variance with the principles of the common law (Piggott, page 5), suggests some of the considerations of public policy which enter into the question whether extradition shall be extended to the field of guardianship and ward, and to escape from custody under process in the nature of civil process, like the decrees under which insane persons, idiots, and infants are held in control.

Thinking simply of situations involving the custody of infant children in divorce cases under civil decrees, and escapes, and controversies between parents as to control, it is impossible to foresee the oppressions and confusions which might result if the constitutional provision as to extradition is to be accepted as a power to operate upon such abstract, drastic, and absolute lines as are urged here on behalf of New York.

The absolutism of extradition power involves neither a feasible nor a rational process for forcible return of persons escaping from idiocy, infancy, or insanity guardianship custody. It is because there have been so many attempts to use extradition power in connection with personal control and custody of weak-minded persons for property purposes, and because what has been attempted in the past will doubtless be attempted in the future in respect to such classes, that, if the constitutional provision is given such an interpretation and such a scope, it will surely sometimes be made to operate blindly, arbitrarily, and unjustly in fields of uncertainty. It is because the extradition power, in a large sense, exercises itself blindly and automatically, that it should not inconsiderately enter into the field of uncertainty. Courts would be reluctant to force such a situation under rules of liberal construction, at the expense of perversion and an unreasonable extension of a carefully guarded constitutional power.

It must be borne in mind that the person here sought to be extradited is not interposing insanity against extradition as an original and independent fact dehors the record, as was done in the Charlton case (229 U. S. 447), where the extradition record was fair and complete upon its face, with no suggestion of mental incapacity, and that this case is not like that, because here the demanding state must from the very nature of the situation, and does, in describing its alleged offence, introduce upon the face of the extradition record the fact that the custody under which the petitioner was held and from which he escaped, was based upon a finding of insanity, and such a finding only.

If Charlton had been tried in Italy for homicide at Lake Como, and had been acquitted on the ground of insanity, and had been committed to an insane hospital under the force of such an acquittal and of such a finding, and had escaped to this country, and Italy in its papers had sought international extradition describing such a situation, his case would have been something like the one under

consideration here, and a very different one from that which was decided by the Supreme Court.

In this sense, viewing the situation more as one involving a general question of public policy of vastly more importance even than one of personal right in a particular case, the facts of record are destructive of the idea that the case is one within the intended constitutional area of extradition; in other words, such papers upon their face affirmatively put a negative upon the idea that the power of extradition is operating as was intended in the field of strict crime.

The leading case on the question of the necessity of particularity of description is that of The People v. Brady (56 N. Y. 182), where it was held in effect that a vague and unsatisfactory charge of crime was not sufficient, and that a full and explicit description of the crime by the demanding state was a condition precedent to the obligation to surrender. This case is discussed at considerable length by Moore in his work on extradition, where other authorities are cited (including Ex parte Stanley, 25 Tex. App. 372, State v. O'Connor, 38 Minn. 243), with explanations of the reasons for the rule. See Moore on Extradition, sec. 634, to and including sec. 640. And the doctrine of particularity was recognized in New York in the later case of Corkran v. Hyatt (172 N. Y. 176, 191, 193), sustaining habeas corpus and the idea of the right and duty of the court to review the acts of the executive in respect to the questions involved in the description of the crime and the allegations of flight. And this decision was sustained by the Supreme Court in 188 U. S. 691.

The rule requiring that a crime shall be legally charged, and described with particularity and certainty, is several times stated by Spear in his book on extradition, which was characterized by Mr. Justice Miller in United States v. Rauscher (119 U. S. 407, 417), as a very learned and careful work. See pages 289, 361, 365, 369. The reason for the rule is apparent, and has been so generally recognized by the courts as to render discussion and citation of authorities unnecessary, and it will not be pursued further than to say that the rule does not mean that the crime shall be described with such technical precision as would stand the test of all questions which might be raised against an indictment, but that it does mean that the facts shall be so fully and particularly recited in the requisition papers that the state upon which demand is made can see that it presents such material facts as will include the elements of crime contemplated by the constitutional provision, which means, of course, a description of the crime and a description of a responsible person.

As, for instance, to use an extreme illustration, if it were Mary Jones who were charged with an extraditable crime, and the description of the person rested with her name and place, it would, of course, aided by the usual presumption of responsibility, be quite sufficient; but if in describing the crime it was said that Mary Jones was a child four years of age, who was guilty of the crime of conspiracy in escaping from guardianship custody decreed in a

ivorce case, the description would render the charge incomplete nd put the case outside of the field of extradition.

It is strongly urged by counsel for the petitioner in this case that he real and substantial purpose of the extradition sought is not to unish for the supposed misdemeanor involved in the escape, but o secure a return of the petitioner under extradition power upon charge of crime, for the ultimate purpose of reconfinement at the latteawan Hospital as an insane or dangerous person.

I think the reasonable interpretation of the entire proceeding, ncluding the statement of counsel (Record, page 154), "We ex-ect to take this man back; we expect to try him and punish him or his crime, and when he has taken his punishment for his crime, e expect to put him where he belongs and where he will not be a enace to the public," is at least that the sole purpose is not to unish for the supposed crime of conspiracy to escape from guard-nship custody.

Although the general theory of the extradition law is that it perates only in the strict field of crime, and that extradition rocess is only to be used for the return of persons for the sole and enuine purpose of punishment for crime, and though recommit-ent at Matteawan would not be punishment for crime, but de-ntion under guardianship relations and civil process, and though here are very many cases and publications which broadly discuss, ith strong expressions, the question of bad faith and the question f the misuse of extradition process for ulterior purposes, I am not nclined to base my decision upon that phase of the controversy etween the petitioner and the state of New York, or to discuss it arther than to cite In re Cannon, 47 Mich. 481, and the various pinions in the English case of Pooley v. Whetham, 15 Ch. D. 435.

The petitioner in this case was tried before a jury in New York ty in 1908 under an indictment for an alleged homicide, and as acquitted by the jury on the ground of insanity. It was there-pon ordered that he be detained in safe custody and be sent to the atteawan State Hospital, there to be kept until discharged by due ourse of law. The hospital was one established by the laws of ew York to be used for the purpose of holding in custody and aring for such insane persons as might be committed thereto.

In August, 1913, the petitioner escaped from such custody, and eing found in New Hampshire, was taken into custody under state rocess, and while in the custody of the New Hampshire authorities, nder requisition papers from New York, he petitioned for habeas rpus upon alleged constitutional grounds.

New York in its brief expressly disclaims that its extradition pro-eding is in any sense based upon the idea that the escape from e state asylum in Matteawan is a crime under the laws of the state New York, or that the indictment is for an escape, or for a con-iracy to commit the crime of escape. And it is true that, while e New York statutes do provide that it shall be a crime or mis-emeanor to escape from custody under a sentence for crime or mis-emeanor, and for recapture of persons escaping from such custody nder a sentence of imprisonment for crime (Birdseye's Cumming

and Gilbert's Consolidated Laws of New York, page 4023), it has not been made to appear that there is in fact any New York statute making it a crime to escape from hospital custody under process like that in question here.

New York in its brief bases its case upon the idea that that state was the legally appointed guardian of Thaw while insane, and upon the allegation of a conspiracy to pervert and obstruct justice and the due administration of the law, which, they say, is a misdemeanor under the laws of the state. Therefore all thought that the custody of Thaw is sought as a matter of punishment for a homicide must be dismissed as having nothing to do with the legal or constitutional questions involved.

The indictment, without even alleging the then existence of insanity as a necessary basis of a continuing right of control, recites the nature of the alleged conspiracy, and refers to the custody under which the petitioner was held. It is conceded that an overt act, though not a necessary element at common law, is a necessary element of conspiracy under the statutes of New York. It is contended, however, that, though the act of escape was not a criminal act, the act of walking out, or, in other words, of escaping without violence, should be accepted as an overt act under the New York statutory criminal law of conspiracy. The act of walking out, however, is not relied upon as the sole overt act, because it is argued that entering the automobile which was to take him away, and perhaps other things incidental to the flight, should be accepted as overt acts in furtherance of the conspiracy for a flight, whereby justice and the due administration of the law were to be perverted.

The petitioner was in confinement under civil process at Matteawan Hospital in Dutchess County, and the indictment was presented in the city and county of New York. Neither the place of the alleged conspiracy nor the means or manner of developing the escape, or of the knowledge or intention of obstructing justice and the due administration of the law, are with particularity, if at all, set out in the indictment, except it is said that certain of the alleged conspirators drove an automobile to Matteawan, where it awaited the petitioner, and where the petitioner entered the car, from whence he was carried out of Dutchess County and out of the State of New York.

As to requirements in respect to a particular description of the means where the overt act is not a crime, see Pettibone v. United States, 148 U. S. 197, 203, 206; State v. Burnham, 15 N. H. 396, 402; State v. Parker, 43 N. H. 83; State v. Potter, 28 Ia. 554; State v. Stevens, 30 Ia. 391; State v. Jones, 13 Ia. 269; State v. Roberts, 34 Me. 320; Commonwealth v. Shedd, 7 Cush. 514; Commonwealth v. Hunt, 4 Met. 112, 125; Lambert v. The People, 9 Cow. 578.

The sufficiency of an indictment involved in an extradition proceeding is open to inquiry (51 Fed. 213), and the sum of the contention in respect to the indictment here is that even though the act of walking out and walking away from the hospital and out of the state would not be a crime, that the act though lawful, when

associated with a plan to have a carriage or an automobile there to carry the escaping person away, that the escape would become a crime. Such a position involves a considerable measure of refinement in order to bring the case within the constitution, and while there is apparently serious doubt whether the indictment sets out a situation which clearly discloses a crime or misdemeanor under the laws of New York, it is not deemed that the exigencies here demand a careful analysis of the question with a view of its definite technical determination, because it would at least require that rules of liberal construction should be invoked in order to reach such a conclusion, and rules of liberal construction are not permissible where the exercise of peremptory force against personal liberty is involved. I prefer, rather than to make the technical analysis of the question of crime in such a situation, to put my decision on the ground that the papers reasonably negative the idea of criminal responsibility, and that for that reason the charge of crime in the constitutional sense is unsubstantial and incomplete.

Knowledge or appreciation of wrongdoing is always an essential of crime, and it is only a statement of a natural truth, that every person who is held in restraint upon the ground that he is mentally impaired, feels that he is wrongfully restrained. A man who is in fact sane and level knows that his restraint under such circumstances is wrongful; and, as a rule, the man who is insane or mentally impaired believes that he is sane and that his detention is wrongful; and as a general rule, the insane person actually believes that it is his custodians, or those who put him in custody, rather than himself, that are insane.

The history of the world is full of attempts of persons to regain liberty, involving escapes from political restraints and punishments, military confinements, and confinements upon the ground of insanity, idiocy, and imbecility; and it is rare that such attempts have been viewed as offences in the strict criminal sense. Therefore, if the indictment, under liberal analysis, describes a technical misdemeanor, it is not deemed to be a description of a crime so substantial as to answer the constitutional substantive requirement of a charge of crime, and to become the foundation for carrying a great body of law into fields which it has never before entered.

Among other things which the case of Roberts v. Reilly (116 U. S. 80), decided, are the propositions that a person sought to be extradited is entitled to invoke the judgment of the judicial tribunals by writ of habeas corpus upon the question of the wrongfulness of his arrest and imprisonment, and upon the question whether he is a fugitive from justice in the sense of constitutional extradition, and that both of these questions are subject to judicial review.

It is true that the question whether a given person is a fugitive from justice is a question of fact to be determined upon the face of the papers, unless attacked by proofs, and it is a principle of law that where there is no controversy about the facts as stated,

that the question of fact is to be determined upon reasonable construction, and under reasonable processes of deduction.

Now is it probable, or even possible, to reach the conclusion, through an examination of the history of this case as presented by the requisition papers of New York, that the petitioner was fleeing from his escape or that he ever thought that he was fleeing from the misdemeanor involved in his escape? Of course he was not. It is the purest fiction to say that the man was fleeing from the escape. His flight was in every substantial sense a flight, not from the crime which he was committing in walking out of Matteawan, but from incarceration and guardianship environment. Nothing could be more axiomatic than the proposition that a man who was restrained of his liberty, a restraint to which he was objecting as unwarrantable, who escapes without force, is fleeing from the objectionable control, rather than from the possible crime involved in his escape. Under reasonable inference, upon the face of the papers from New York's description of the escape, in every sense save an extremely fictional one, the flight was from Matteawan environment, not from the crime of escaping and fleeing from environment.

Flight is a fundamental, substantial, and necessary element of the constitutional power of extradition. It must be established in order that the power shall operate. Though it has been said in some of the cases that presence in a state at the time of the alleged crime, and presence in another state at the time extradition is sought, is sufficient to create the contemplated constitutional flight, such utterances were not in cases where it was proposed to extend the body of extradition law to classes of cases upon which it had never before operated. It is where the effect of the extension of arbitrary and exceptional power is to make it operate upon new classes, and in restraint of liberty, under principles operating in derogation of the common law, that courts hesitate to take the step except upon substantial grounds and for substantial and necessary reasons of justice.

In a case like this, where the elements must be substantially established, the constitutional element of flight must have some causal relation to the specific crime alleged as the ground for invoking the constitutional power of extradition. It is entirely technical, unsubstantial, and the merest fiction to say, and it would be a bold man who would maintain, that one confined for insanity, and escaping, was fleeing from the escape, rather than from the confinement of which he was complaining. It is for these reasons, under the circumstances of this case, that I think the flight should not be accepted as the kind of a flight contemplated by the framers of the constitution when they created the right of extradition for crime.

In the rescript handed down in this case December 17, something was said about the question of the constitutionality of the New York statute, under which the petitioner was held at Matteawan, and that such a question under the circumstances would not ordinarily be entered upon by a judge of first instance. I still hold

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to that view, although counsel on both sides, under commendable research, have fully argued in respect to its validity.

Contrary to conditions in England, where a commitment is made upon a verdict of "guilty, but insane," under the New York statute the commitment was upon a verdict of acquittal because of insanity, and thus there is presented a question perhaps essentially different from questions raised in criminal procedure in England. The point here is that, upon the facts being certified that he was acquitted upon the ground of insanity, *that* he was incarcerated at Matteawan without any evidence of his mental condition at the time of the committal other than that which was addressed to the jury and had reference to his mental condition at the time of the alleged homicide; while the statute only authorizes confinement upon mental condition existing at the time of commitment; and that the commitment was until he was discharged by due course of law, when the statute which authorizes the commitment only presupposed confinement until the person committed became sane; and that the statute, which assumes to authorize restraint until sane, operates wrongfully, because a person might, though insane, be altogether helpless and harmless, and because the statute furnishes no adequate remedies for release from the kind of custody created by virtue of the statute in question and upon the proceedings subsequent to the acquittal.

A question arising in the Supreme Court from the state of Washington, in the case of Urquhart v. Brown (205 U. S. 179, 183), upon a statute similar to this, though the case was decided upon the ground that the question should have been raised directly from the decision of the pending case in the state of Washington rather than collaterally upon habeas corpus, the question involved in the attack upon the constitutionality of the statute was expressly left as an open question. It is because a constitutional question like this has been before the Supreme Court and left undecided, and because it would not be useful for me to enter upon a discussion of the constitutional question, and because I think it need not be entered upon in this case for the reason that the papers do not present an extraditable offence, that I leave the question of the validity of the New York statute, under which the petitioner was held, without discussion.

It is sometimes contended in support of a proposition which is being urged that there ought to be a remedy to compel certain results, and that, if the one urged fails, the situation is remediless. It does not seem to me that that argument obtains here. Although the question is not directly involved, and although it is quite unnecessary for me to make any suggestions about it, I should suppose, though guardianship has no positive force extraterritorially except under rules of comity, that, under the tendency of modern statutes and decisions to defer to the law of the domicile and to support the authority of the guardian, that under our interstate relations, as well as in England under the common law and by statute, a guardian, whether a natural guardian; a guardian created by the court for the protection of infants, idiots, or insane persons; or whether

it is a state exercising the right of guardianship control under
doctrine of parens patriæ, for the purpose of protecting the unfor
nate person and the community, might, in case of escape, take
evidence of its authority and of the escape, and take the ward i
custody wherever he was found, and that the right of guardians
control would be exercised against him, not because he was a cri
nal, but because he was a ward subject to guardianship cont
Such supposed right of custody being asserted, if the ward objec
to return and restraint, he could have his orderly proceeding
the courts; and, if the guardian's right of control was interfe
with, either by the ward or by members of the public, he co
resort to the courts for suitable process to protect and effectuate
right; and habeas corpus would be a plain, orderly, appropriate,
adequate remedy in the hands of the guardian if obstructions
thrown in his way, and in the hands of the person sought to
restrained if he sees fit to oppose the return. Under such a proce
ing, with the parties present, the scope of the inquiry would per
considerations of comity and discretion, and of the mental and ph
cal wellbeing of the ward whose restraint was sought.

If it were an infant escaping from guardianship custody crea
in a divorce case, and the controversies about the custody of child
in such situations are numerous, and getting more so, a lead
consideration would be its physical and mental wellbeing. I
were an idiot of irresponsibility and in illhealth, the same, w
doubtless other considerations, would be within the scope of judi
inquiry. If it were a person who had escaped from custody ba
upon insanity or dangerous mental conditions at the time of
commitment, and if at the time his recovery is sought his me
condition was an open one under the decisions of the state creat
the guardianship, and the right of control being based solely u
mental condition, that question, and others quite likely, would
a proper subject of inquiry in a proper proceeding raising the q
tion of the right of the guardian to continue his control. And
all situations with respect to idiots, infants, and the insane,
question of physical and mental wellbeing would become an i
portant and perhaps a leading consideration.

Though there may not be any case where a state, in its capac
as guardian under the parens patriæ doctrine, has exercised t
right, the principle is quite within hundreds of cases that have b
decided with respect to guardianship control, but I only cite
opinion of Judge Walker in 72 N. H. 71; 3 Blackstone's Comm
taries, pages 132, 133, and note; Peck, Domestic Relations, sect
143 and cases cited in notes; as sufficiently suggesting the princi
and the line of authorities.

My conclusion is that the constitutional right of extradition
crime does not reasonably apply itself to such a situation as t
where the right of control by the demanding state resides in a
cree of custody based upon insanity, and where its papers upon th
face negative the idea of personal criminal responsibility. It
further thought that it would involve forced and fictional reas
ing to make a flight of the character of the one in question

kind of a flight contemplated by the Constitution as a basis for extradition.

It results that an order will be made sustaining the writ, and that the petitioner be discharged from the extradition process under which he was held at the time his petition for habeas corpus was brought upon constitutional grounds.

It has been understood from the beginning that, whichever way this case might be decided by me, it would be taken to the Supreme Court. Therefore, no formal order will be made either sustaining the writ or discharging the petitioner until the aggrieved party has had an opportunity to perfect its appeal. When there is such readiness, and when convenient to counsel to have the operation of the appeal put into effect, the orders will be made, and the discharge suspended by some appropriate order pending the appeal.

My reasoning about this case involves no criticism upon the act of Governor Felker in ordering extradition. His action was based upon the idea that the scope of a governor's right to investigate and deal with judicial and constitutional questions was limited, and that, except in clear cases of failure to charge a crime, that extradition should go as of course under the perfunctory mandate of the Constitution, yet he expressly and wisely, under the discretionary power which he possessed, guarded the humane idea, expressed in the English statutes, that the warrant should not operate until the petitioner had had an opportunity, under a writ of habeas corpus, to test his rights in the courts, which were supposed to be possessed of power and machinery, as to the legal and constitutional questions, which the executive did not possess, the Governor expressly saying that "such procedure affords Mr. Thaw an ample remedy before a tribunal having jurisdiction of such extraordinary remedies, with the power to issue final process for carrying its judgments into effect."

Now as to bail. This question, differently from the questions arising upon the face of the requisition papers, requires consideration of the actual fact of present mental condition because, under the constitutional power, the exercise of the right of extradition depends alone upon what appears upon the face of the papers; while under the motion for bail there arises on the public phase a question of present mental condition as a matter of fact.

On the sixth day of December, 1913, the petitioner moved for bail, basing his motion upon the ground that, under the laws of New York, as he was indicted for misdemeanor only, he was entitled to bail as of right, asserting that his alleged co-conspirators had all been admitted to bail. The motion was discussed orally upon the assumption on the part of New York, as well as others, that the petitioner was entitled to bail unless it would be dangerous to the community to set him at large.

A rescript was handed down December 17, in which the right of bail was somewhat discussed, with the conclusion that the petitioner was entitled to it unless his liberty would be a menace to the community. Both parties expressed a desire to be heard upon that question, and to produce witnesses and records. It appeared in argu-

ment that the last hearing on Thaw's mental condition before J
Mills in New York occupied something like seven weeks, and
seventy-seven witnesses were examined orally, and that the re
contained the testimony of forty-nine other witnesses, both el
including a large number of experts who were called on the two s
Counsel were informed that the question of bail was, aside from
right of Thaw, a question with a public phase, and that it was
proposed to enter upon an extended adversary hearing as to
mental condition, and that it was thought that public exigen
if any, could be answered by a non-partisan commission to m
investigations and to answer the question in respect to public da
without an adversary hearing.

Acting upon the theory of the New York cases relating to
petitioner's mental condition, (Peabody v. Baker, 110 N. Y. s
848, Peabody v. Chanler, 117 N. Y. Sup. 32, Thaw v. Lamb,
N. Y. Sup. 389), the substance of which is, that Thaw was hel
New York, not for punishment, because he had been acquitted,
only as a temporary expedient, and that there was no pretenc
holding him a moment after his restoration to a non-dangerous
dition, and that the question of mental condition was open and
not one within the res judicata rule in the sense that its determi
tion as of today was to control the future, and of my own moti
and without suggestion from either party as to personnel, a c
mission was created charged with the duty of making such exami
tions as it should see fit, under certain limitations.

The purpose was, not only to have a commission in whose ju
ment I should repose more confidence than in my own, based u
an adversary hearing, but one which would command the co
dence of the community. Therefore the commission was made
consist of one of the most prominent lawyers in New England a
three expert alienists of high standing. The work of the comm
sion was undertaken with the idea that it should be entirely n
partisan, and in aid of justice, and even without any assurance t
it was certain that any compensation could be made for the la
performed. Indeed, the work in fact was entered upon quite in
sense of a discharge of public duty, at the request of the court,
aid of justice.

The reasons for appointing the commission appear in the reco
of December 17, and the findings in respect to non-danger appe
from the report which is a part of the record. After the report w
filed, the petitioner moved for leave to introduce witnesses, consi
ing of alienists who had seen and examined him since his esca
and by whom the petitioner's counsel expressed a wish to supplem
the report of the commission as to present mental condition. Th
motion is denied, on the ground that the purpose of appointing t
commission was to avoid a public adversary trial, as a thing unnec
sary under the circumstances.

On January 13, 1914, the petitioner moved for a hearing on th
question of bail, and that the report be accepted and adopted. Aft
hearing the parties, the report of the commission is accepted and a

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proved, as sufficiently showing the mental condition of Thaw, so far as it is involved in the question of bail.

Since the rescript of December 17 an examination of authorities has raised a query in my mind whether the various statutes and constitutions creating the absolute right of bail in misdemeanor cases, which ordinarily operate as an imperative mandate upon courts, are to be accepted in cases arising in habeas corpus proceedings in respect to interstate extradition. The English case of Queen v. Spilsbury, L. R. (1898) 2 Q. B. D. 615; and Wright v. Henkel, 190 U. S. 40; Moore on Extradition, Vol. II, pages 973, 974; Piggott on Extradition, page 94; Ex parte Erwin, 7 Tex. App. 288; Ex parte Gaynor and Greene, 9 Can. Cr. Cas. 255, are among the authorities which discuss the question of the right of bail in habeas corpus proceedings interposed upon extradition process.

I have no doubt of the right of the court to grant bail under the circumstances of this case; but as the question is an interlocutory one, of which the petitioner has the right to avail himself at any time and at any stage of the proceedings, and as the case is about to go out of the control of this court and into the Supreme Court, and as Supreme Court Rule 34 has an important and perhaps a controlling bearing upon the question, I am disposed to leave the motion for bail undetermined, without prejudice.

I am not influenced at all upon this question by any fear that the community would be in danger by giving the petitioner liberty under bail, because I accept the report of the commission, based as it was upon non-adversary investigations and examinations, and upon proofs of absence of indications of personal violence since commitment to Matteawan, supplemented by my own observations of the man at the several hearings, as sufficiently establishing non-dangerous mental condition, so far as it is involved in the question of bail, and that any supposed danger to the community through liberty under bail is so remote as not to warrant his being deprived of liberty of bail upon that ground. If the broad provisions of Rule 34 are to be interpreted as covering questions of bail in habeas corpus, where the person is taken from extradition custody, they are entirely conclusive of the question here in favor of bail, because in general terms they cover all habeas corpus cases. That that rule is something more appropriate for interpretation by the Supreme Court than by this court, is the reason for leaving the question of bail undecided. I am not at all certain that I am not denying a plain right, and doing the petitioner injustice, by leaving this question undeceided. If such is the case, an opportunity is open for him to seek redress from the higher court before whom this case will soon be pending.

Assignment of Errors.

[Filed May 8, 1914.]

And now comes the respondent herein, Holman A. Drew, by his attorneys and makes the following assignment of errors: The court erred:

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First. In sustaining the writ of habeas corpus and discharging the petitioner, Harry Kendall Thaw, from custody under the extradition warrant issued by the Governor of the State of New Hampshire.

Second. In holding that the petitioner, Harry Kendal Thaw, was not substantially charged with crime under Article IV, section 2, paragraph 2 of the Constitution of the United States.

Third. In holding that the petitioner, Harry Kendall Thaw, was not a fugitive from justice under Article IV, section 2, paragraph 2 of the Constitution of the United States.

Fourth. In holding that the process under which the petitioner Harry Kendall Thaw, was held was not due process of law under Article IV, section 2, paragraph 2 of the Constitution of the United States.

Fifth. In holding that the warrant of extradition issued by the Governor of the State of New Hampshire was illegal, invalid and unwarranted under Article IV, section 2, paragraph 2 of the Constitution of the United States.

Sixth. In holding that upon the whole record this case does not come within the provisions of the Constitution of the United States relating to extradition.

Seventh. In not holding that the petitioner, Harry Kendall Thaw, was legally in custody under the warrant of extradition issued by the Governor of the State of New Hampshire.

Eighth. In not dismissing the writ of habeas corpus and in not remanding the petitioner, Harry Kendall Thaw, to the proper custody for extradition to the State of New York.

Ninth. Because upon the whole record the writ of habeas corpus should have been dismissed, the warrant of the Governor of the State of New Hampshire sustained and the petitioner, Harry Kendall Thaw, remanded to the proper custody for extradition to the State of New York.

Wherefore said respondent prays that the order, decree and judgment sustaining said writ of habeas corpus and discharging the petitioner herein, Harry Kendall Thaw, be reviewed and reversed; that said writ of habeas corpus be dismissed and that said petitioner be remanded to the custody of the said Holman A. Drew, Sheriff of Coos County, New Hampshire, under the aforesaid warrant of the Governor of the State of New Hampshire for extradition to the State of New York.

Dated, May 8th, 1914.

HOLMAN A. DREW,
By THOMAS CARMODY.

Petition for Appeal.

[Filed May 8, 1914.]

Now comes Holman A. Drew, the respondent herein, and conceiving himself aggrieved by the order, decree and judgment made by this court, whereby among other things the writ of habeas corpus

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herein was sustained and the petitioner herein, Harry Kendall Thaw, discharged from custody under the extradition warrant or process issued by the Governor of the State of New Hampshire on the 8th day of November, 1913, does hereby appeal from said order, decree and judgment to the Supreme Court of the United States and for the reasons specified in the assignment of errors filed herein; and further here prays that this appeal may be allowed and that the court certify that there is probable cause for the allowance of such appeal and that a transcript of the record, papers and proceedings upon which such order, decree and judgment were made duly authenticated may be sent to the Supreme Court of the United States; and further prays that said appeal may operate as a supersedeas upon the respondent herein giving a bond in such sum as may be fixed by this court for costs and damages, and that pending such appeal the petitioner herein, Harry Kendall Thaw, be remanded to the custody of E. P. Nute, United States Marshal, and Holman A. Drew, Sheriff of Coos County, unless otherwise ordered by the Supreme Court of the United States.

Dated, May 8th, 1914.

HOLMAN A. DREW,
By THOMAS CARMODY, *Attorney.*

Bond for Costs.

[Filed May 8, 1914.]

Know all men by these presents: That we, Holman A. Drew, of Berlin, in the County of Coos, and State of New Hampshire, as Principal, and the American Surety Company of New York, a corporation established under the laws of the State of New York and having an office and usual place of business in New York in the State of New York, authorized under the laws of said State of New Hampshire to issue bonds in said State of New Hampshire, as Surety, are held and firmly bound unto Harry Kendall Thaw, Commorant of Concord, in the County of Merrimack, and said State of New Hampshire, in the sum of Five Hundred Dollars ($500) to be paid to said Harry Kendall Thaw, for the payment of which well and truly to be made we do bind ourselves, our heirs, executors, administrators and assigns, firmly by these presents.

Sealed with our seals, and dated this 8th day of May, A. D. 1914.

Whereas, the above named, Holman A. Drew, has prosecuted an appeal to the Supreme Court of the United States, to reverse the decree entered herein granting the writ of habeas corpus and discharging said Harry Kendall Thaw from the custody under which he was held.

Now, therefore, the condition of this obligation is such that if the above named, Holman A. Drew, shall prosecute said appeal to effect and answer all damages and cost, if he shall fail to make

good said appeal, then the above obligation is to be void, other
to remain in full force and effect.

HOLMAN A. DREW. [SEAL
[SEAL.] AMERICAN SURETY COMPANY O
NEW YORK.
By FRED L. ROBERTS,
Resident Vice-Presiden

Attest:

WARREN L. WINSLOW,
Resident Assistant Secretar

Signed, sealed and delivered in the presence of:
BERNARD JACOBS.

Countersigned at Concord, N. H., by
EASTMAN & MERRILL, *Agents*.

Bond approved May 8, 1914.
EDGAR ALDRICH,
District Judge.

Extract from the Record of the Board of Trustees of American Surety Company of New York.

The first meeting of the Board of Trustees of the American Su
Company of New York, after the annual Stockholders' meeting,
held at the office of the Company, No. 100 Broadway, New Y
City, on Tuesday, January 20, 1914, at eleven o'clock A. M.

"The Secretary read the report of the Nominating Committe
follows:

"To the Board of Trustees of the American Surety Company
New York.

"GENTLEMEN: The Committee appointed by the Executive C
mittee of this Company at their meeting held Tuesday, Decembe
1913, for the purpose of nominating officers of the Company,
the ensuing year and until their successors are elected, beg leav
report as follows:

"We nominate for

Place.	Resident Vice-Presidents.	Resident Assistant Secretaries.
Boston, Mass.	Chas. D. Burrage	E. F. Philbrick
	Eliphalet F. Philbrick	Fred L. Roberts
	James P. Stearns	Warren L. Winslow
	Alfred L. Ripley	George F. Fellows
	Fred L. Roberts	Thomas J. Gargan
	Gilbert R. Griffin	Clinton S. Masseck
	Peter A. Duffy	Frederick W. Connol
	H. Robert Bygrave	Carl J. Hodge

* * * * * * *

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"Whereupon, it was

"Resolved, that the Secretary be authorized to cast one ballot on behalf of the Trustees present, for the Members of the Executive Committee, Finance Committee, Committee on Accounts, Committee on Capital Box, Officers and Counsel, as recommended by the Nominating Committee for the ensuing year and until their successors are elected; which was done, and thereupon the aforementioned persons were declared to have been unanimously elected to their respective offices for the ensuing year and until their successors are elected.

* * * * * * *

"The following resolution was adopted:

"Resolved, that the Resident Vice Presidents be and they hereby are, and each of them is hereby, authorized and empowered to execute and to deliver and to attach the seal of the Company to any and all obligations for or on behalf of the Company, such obligations, however, to be attested in every instance by the Resident Assistant Secretary."

* * * * * * *

STATE OF NEW YORK,
County of New York, ss:

I, H. A. Reiss, Assistant Secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts, from the Record Book of the Board of Trustees of the American Surety Company of New York, with the original record of said Board, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said Record Book; and I further certify that I have compared the foregoing resolutions with the originals thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolutions; and that the said resolutions have not been revoked or rescinded.

Given under my hand and the seal of the Company, at the City of New York, this 21st day of January, 1914.

[SEAL.]

H. A. REISS,
Assistant Secretary.

Order of Court.

[May 8, 1914.]

ALDRICH, *J.*:

For the tentative purpose of dealing with the claim for an appeal In re Harry Kendall Thaw, the printed record in its present form down to and including the Opinion handed down April 14, 1914, may be accepted as the record subject to such eliminations as counsel may agree to under the approval of the Court.

The further record will include the order for compensation to the Commissioners, which is handed down this day.

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Order of Court as to Compensation of Commission.

[May 8, 1914.]

The petitioner, being in custody under a habeas corpus moved for bail, and the State of New York objected upon ground that the petitioner's liberty under bail would be a me to the community. Thus an issue of fact was raised between parties, and rather than have an adversary trial and hear evid as to mental condition with resulting large expense to the pa the court, upon its own motion, appointed a Commission to m necessary examinations and report. The members of the Com sion assumed the task thus imposed without any assurance compensation could or would be made. Apparently consider time and expense was devoted to the task and I think justice quires that the Commissioners should be reasonably compens Litigation of this character being treated by the Governmen private litigation, no way is seen for resting the expense u the Government. Therefore, the burden should be rested upon parties, one or both. Primrose v. Fenno, 113 Fed. 375; Fenn Primrose, 119 Fed. 801; Corporation of St. Anthony v. Houlih 184 Fed. 252.

The question having been precipitated by the petitioner thro his motion for bail, I think he should assume the burden sub to its being ultimately rested upon the losing party in the hab corpus case as taxable costs unless there is some reason for except this case from the principle of the above authorities.

I fix the amount of compensation as follows:

Hon. Frank S. Streeter, Concord.....$1,200.00, Expense $100
Dr. Bancroft, Concord.....$1,000.00, Expense $75
Dr. Prince, Boston.....$1,000.00, Expense $100
Dr. Blumer, Providence.....$1,000.00, Expense $100

I am aware that the compensation fixed is much less than wo ordinarily be accorded, but I look upon the situation as one in wh eminent men rendered service in the nature of a public service, i large measure gratuitously, in aid of justice.

EDGAR ALDRICH,
United States District Judge.

Final Decree.

[May 8, 1914.]

ALDRICH, *J.*:

Now on this day comes the petitioner herein, Harry Kend Thaw, by his attorneys and comes also the respondent herei Holman A. Drew, by his attorneys, and this cause having be heretofore argued and submitted, the court now being fully advis in the premises, it is hereby

Ordered, Adjudged and Decreed that the writ of habeas corp

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herein, issued on the 18th day of November, 1913, be sustained and that the petitioner herein Harry Kendall Thaw be discharged from custody under the extradition warrant issued by the Governor of the State of New Hampshire on the 8th day of November, 1913.

And said respondent, Holman A. Drew, by his attorneys, having filed herein an assignment of errors and petition for allowance of an appeal to the Supreme Court of the United States from the aforesaid order and decree, and for a certificate that there is probable cause for such an appeal, and complying with what is understood to be the requirements of the Act of March 10, 1908,

I Hereby Certify that there is probable cause for the allowance of an appeal herein from said order to the Supreme Court of the United States, which is hereby allowed, and it is

Ordered, that a duly authenticated transcript of the record, papers and proceedings upon which the said order and decree were made be sent to the Supreme Court of the United States, and it is further

Ordered, that said appeal operate as a supersedeas and that during the pendency of said appeal the said petitioner, Harry Kendall Thaw, remain in the custody of Holman A. Drew as keeper exercising federal authority by virtue of this order with power to employ such assistants, if any, as he may deem necessary, unless otherwise ordered by some Court of the United States or Judge or Justice thereof, and that the said respondent, Holman A. Drew, file a bond for costs in the sum of Five Hundred Dollars ($500), which bond is now presented and approved by the Court.

Dated, May 8th, 1914.

EDGAR ALDRICH,
United States District Judge.

Motion of Petitioner as to Record on Appeal.

(Filed May 23, 1914.)

Now comes the said Harry Kendall Thaw and respectfully requests that the entire record which has been printed in the District Court of New Hampshire be incorporated in the record on appeal to the Supreme Court of the United States, consisting of both volumes of the printed record as they are now printed.

HARY KENDALL THAW,
By His Attorneys,
DREW, SHURTLEFF, MORRIS & OAKES,
MARTIN, HOWE & DONIGAN,
WM. A. STONE,
WM. M. CHASE.

Motion of Respondent as to Record on Appeal.

(Filed May 23, 1914.)

Now comes the respondent, Holman A. Drew, and indicates the following portions of the record to be incorporated in the record on appeal to the Supreme Court of the United States:

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Supplemental petition for writ of habeas corpus begi
ning at bottom of page 67 to page 102 inclusive; same, b
ginning at bottom of page 115 to page 134 inclusive; su
plemental writ of habeas corpus, pages 134, 135; order of Court
to custody, pages 135, 136; return to writ of habeas corpus, pag
136-139 inclusive; answer to return to writ of habeas corpus, pag
139, 140; Opinion of the Court, page 225 to 253 inclusive; assig
ment of errors, pages 253, 254; petition for appeal, page 255; bo
for costs, pages 255-258 inclusive; order of Court, page 259; ord
of Court as to compensation of Commission, pages 259, 260; fin
decree, pages 260, 261; citation, page 261.

HOLMAN A. DREW,
By His Attorney, BERNARD JACOBS.

Order of Court as to Record on Appeal.

(Filed May 26, 1914.)

ALDRICH, *J.:*

The motions filed by the parties May 23, 1914, make it appare
that they do not agree as to eliminations from the proceedings i
the District Court record on appeal to the Supreme Court.

That being so the entire record may as well go up and it is
ordered.

United States of America to Harry Kendall Thaw, Greeting:

You are hereby cited and admonished to be and appear in th
United States Supreme Court at Washington, D. C. thirty days fro
and after the day this citation bears date, pursuant to an appe
filed in the Clerk's office of the District Court of the United Stat
for the District of New Hampshire, wherein Holman A. Drew
appellant plaintiff in error, and you are appellee to show cause,
any there be, why the order and judgment rendered against the sa
appellant as in said appeal mentioned should not be correcte
and why speedy justice should not be done the parties in th
behalf.

Witness the Honorable Edgar Aldrich, Judge of the Distri
Court of the United States for the District of New Hampshire th
8th day of May in the year of our Lord one thousand nine hundre
and fourteen.

[Seal of the District Court, New Hampshire District.]

EDGAR ALDRICH,
United States District Judge for
the District of New Hampshire.

Service of the above citation is accepted this 8th day of Ma

HARRY KENDALL THAW,
By MERRILL SHURTLEFF,
His Attorney.

Clerk's Certificate.

UNITED STATES OF AMERICA,
District of New Hampshire, ss:

I, Burns P. Hodgman, Clerk of the District Court of the United States within and for the District of New Hampshire, within the First Circuit, certify that the foregoing is a true copy of the record in the action entitled, No. 86, In re Petition of Harry Kendall Thaw, for Writ of Habeas Corpus, in said District Court determined, the Petition for Appeal, Assignment of Errors, Bond on Appeal, and also the original Citation issued upon the appeal of the respondent in said cause, with the acknowledgment of service thereon.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court, at Concord, in the District of New Hampshire, this 28th day of May, A. D., 1914.

[Seal of the District Court, New Hampshire District.]

BURNS P. HODGMAN,
Clerk U. S. District Court, District of New Hampshire.

Endorsed on cover: File No. 24,256. New Hampshire D. C. U. S. Term No. 514. Holman A. Drew, sheriff of Coos county, State of New Hampshire, appellant, vs. Harry Kendall Thaw. Filed June 5th, 1914. File No. 24,256.

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SUPREME COURT OF THE UNITED STATES

HOLMAN A. DREW, as Sheriff of Coos County, New Hampshire,
Appellant.

vs.

HARRY KENDALL THAW,
Appellee.

October Term, 1914. No. 514.

MOTION TO ADVANCE.

THOMAS CARMODY,
Attorney-General of the State of New York, and Attorney for Appellant,
Capitol,
Albany, N. Y.

SUPREME COURT OF THE UNITED STATES

HOLMAN A. DREW, *as Sheriff of Coos County, New Hampshire, Appellant,*
against
HARRY KENDALL THAW, *Appellee.*

October Term 1914.
No. 514.

Please take notice that the appellant in the above entitled appeal will on Monday, ~~March~~ October 12, 1914, or as soon thereafter as counsel can be heard, move the court to advance the hearing of this appeal.

THOMAS CARMODY,
Attorney-General of the State of New York,
Attorney for Appellant.

To WILLIAM A. STONE,
Frick Annex, Pittsburg, Pa.
MERRILL SHURTLEFF,
Lancaster, N. H.

SUPREME COURT OF THE UNITED STATES.

HOLMAN A. DREW, *as Sheriff of Coos County, New Hampshire, Appellant,* against HARRY KENDALL THAW, *Appellee.*	October Term 1914. No. 514.

MOTION TO ADVANCE.

The appellant hereby moves this honorable court upon the record, and upon all the proceedings herein, and upon the following brief and statement, pursuant to the rule of this court in such made and provided, to advance this cause upon the docket of the court for the October Term, 1914, and to set the same for argument immediately or at as early a date as may be convenient to this honorable court.

State of New York, Albany, 15th day of September, 1914.

THOMAS CARMODY,
Attorney-General of the State of New York,
Attorney for Appellant.

SUPREME COURT OF THE UNITED STATES.

HOLMAN A. DREW, *as Sheriff of Coos County, New Hampshire, Appellant,*
against
HARRY KENDALL THAW, *Appellee.*

October Term 1914.
No. 514.

BRIEF OF APPELLANT ON MOTION TO ADVANCE.

This is a proceeding of habeas corpus begun in the district court of the United States, district of New Hampshire to inquire into the cause of the imprisonment and detention of Harry Kendall Thaw.

The first writ of habeas corpus was issued by the Hon. Edgar Aldrich, United States District Judge, district of New Hampshire, at Concord of said district, on the 13th day of September, 1913. A return was made to such writ by Holman A. Drew, sheriff of Coos county, State of New Hampshire, on September 16, 1913. The body of Harry Kendall Thaw was produced under this writ at Littleton, State of New Hampshire, on September 16, 1913, and a hearing had before the said Edgar Aldrich. Upon such hearing Judge Aldrich suspended the proceeding to await the issue and determination of the extradition proceedings for the return of Harry Kendall Thaw to New York, which were then pending.

Harry Kendall Thaw was imprisoned by said Holman A. Drew on the 10th day of September on the charge of being a fugitive from justice from the State of New York for the crime of conspiracy. Following his arrest requisition papers were issued on the 12th day of September, 1913, by Martin H. Glynn, Acting Governor of the State of New York, asking that the said Harry Kendall Thaw be extradited to New York. These requisition papers were based upon an information sworn to by Edward A. Conger, district attorney of Dutchess county, with the accompanying exhibits.

On October 23, 1913, the said Harry Kendall Thaw, with others, was indicted by the grand jury of the county of New York in the State of New York for the crime of conspiracy.

Sec. 580 of the Penal Law of the State of New York (chap. 88 of the Laws of 1909 as amended, 1913), page 152.

This section provides as follows:

DEFINITION AND PUNISHMENT OF CONSPIRACY.

If two or more persons conspire:

1. To commit a crime; or,

2. Falsely and maliciously to indict another for a crime, or to procure another to be complained of or arrested for a crime; or,

3. Falsely to institute or maintain an action or special proceedings; or,

4. To cheat and defraud another out of property, by any means which are in themselves criminal, or which, if executed, would amount to a cheat, or to obtain money or any other property by false pretenses; or,

5. To prevent another from exercising a lawful trade or calling, or doing any other

lawful act, by force, threats, intimidation, or by interfering or threatening to interfere with tools, implements or property belonging to or used by another, or with the use or employment thereof; or,

6. To commit any act injurious to the public health, to public morals, or to trade or commerce, *or for the perversion or obstruction of justice, or of the due administration of the laws.* (Italics ours.)

Each of them is guilty of a misdemeanor.

Thereupon on October 24, 1913, a new requisition was made by Martin H. Glynn, Governor of the State of New York, upon the Governor of the State of New Hampshire asking for the extradition of the said Harry Kendall Thaw to the State of New York, said requisition papers being based upon the aforesaid indictment. A clerical error in these requisition papers required the issuance of a new requisition on November 6, 1913, based upon the same indictment.

On November 8, 1913, the Governor of the State of New Hampshire, Samuel D. Felker, determined that under the constitution and laws of the United States, Harry Kendall Thaw should be extradited; and honored the extradition of the State of New York and issued his warrant of extradition, dated upon said date, duly executed, in which he directed that the said Harry Kendall Thaw be arrested and delivered to Fred C. Hornbeck, who was duly authorized to receive him in custody and convey him back to the said State of New York.

Thereupon on November 18, 1913, a hearing was had in the habeas corpus proceedings, which had been suspended as aforesaid, at Concord in the

district court of United States, district of New Hampshire, before the Hon. Edgar Aldrich, justice of that court. Upon that hearing, or following it, a supplemental petition for writ of habeas corpus was filed by the attorneys for Harry Kendall Thaw and a supplemental writ of habeas corpus was issued on November 18, 1913, and a return to said supplemental writ was filed by the respondent, Holman A. Drew, on November 22, 1913; and an answer was filed to such return on behalf of the respondent on November 28, 1913. The supplemental proceedings were required so as to cover the warrant of extradition of the Governor, which was issued as aforesaid on the 8th day of November, 1913, after the first writ of habeas corpus had been issued and after the proceedings had been begun.

Thereafter on May 8, 1914, the aforesaid Hon. Edgar Aldrich made a final decree in such proceedings in which he ordered, adjudged and decreed as follows:

> "**Ordered, Adjudged and Decreed,** that the writ of habeas corpus herein, issued on the 18th day of November, 1913, be sustained and that the petitioner herein, Harry Kendall Thaw, be discharged from custody under the extradition warrant issued by the Governor of the State of New Hampshire on the 8th day of November, 1913.
>
> "And said respondent, Holman A. Drew, by his attorneys, having filed herein an assignment of errors and petition for allowance of an appeal to the Supreme Court of the United States from the aforesaid order and decree, and for a certificate that there is probable cause for such an appeal, and complying with what is understood to be the requirements of the Act of March 10, 1908.

"**I Hereby Certify** that there is probable cause for the allowance of an appeal herein from said order to the Supreme Court of the United States, which is hereby allowed, and it is

"**Ordered,** that a duly authenticated transcript of the record, papers and proceedings upon which the said order and decree were made be sent to the Supreme Court of the United States, and it is further

"**Ordered,** that said appeal operate as a supersedeas and that during the pendency of said appeal the said petitioner, Harry Kendall Thaw, remain in the custody of Holman A. Drew as keeper exercising federal authority by virtue of this order with power to employ such assistants, if any, as he may deem necessary, unless otherwise ordered by some Court of the United States or Judge or Justice thereof, and that the said respondent, Holman A. Drew, file a bond for costs in the sum of Five Hundred Dollars ($500), which bond is now presented and approved by the Court."

Thereupon a petition for an appeal directly to this court from such final appeal was made by Thomas Carmody, Attorney-General of the State of New York, on behalf of the respondent herein, Holman A. Drew. This appeal was taken under section 238 of the Judicial Code Act, March 3, 1911, and under the authority of *Pierce* v. *Creecy*, 210 U. S. 387.

At the same time an assignment of errors was filed on May 8, 1914, in which the following assignment of errors in said final decree was alleged:

"First: In sustaining the writ of habeas corpus and discharging the petitioner, Harry

Kendall Thaw, from custody under the extradition warrant issued by the Governor of the State of New Hampshire.

"SECOND: In holding that the petitioner, Harry Kendall Thaw, was not substantially charged with crime under Article IV, section 2, paragraph 2 of the Constitution of the United States.

"THIRD: In holding that the petitioner, Harry Kendall Thaw, was not a fugitive from justice under Article IV, section 2, paragraph 2 of the Constitution of the United States.

"FOURTH: In holding that the process under which the petitioner, Harry Kendall Thaw, was held was not due process of law under Article IV, section 2, paragraph 2 of the Constitution of the United States.

"FIFTH: In holding that the warrant of extradition issued by the Governor of the State of New Hampshire was illegal, invalid and unwarranted under Article IV, section 2, paragraph 2 of the Constitution of the United States.

"SIXTH: In holding that upon the whole record this case does not come within the provisions of the Constitution of the United States relating to extradition.

"SEVENTH: In not holding that the petitioner, Harry Kendall Thaw, was legally in custody under the warrant of extradition issued by the Governor of the State of New Hampshire.

"EIGHTH: In not dismissing the writ of habeas corpus and in not remanding the petitioner, Harry Kendall Thaw, to the proper custody for extradition to the State of New York.

"NINTH: Because upon the whole record the writ of habeas corpus should have been dismissed, the warrant of the Governor of the State of New Hampshire sustained and the

petitioner, Harry Kendall Thaw, remanded to the proper custody for extradition to the State of New York.

"WHEREFORE, said respondent prays that the order, decree and judgment sustaining said writ of habeas corpus and discharging the petitioner herein, Harry Kendall Thaw, be reviewed and reversed; that said writ of habeas corpus be dismissed and that said petitioner be remanded to the custody of the said Holman A. Drew, Sheriff of Coos County, New Hampshire, under the aforesaid warrant of the Governor of the State of New Hampshire for extradition to the State of New York."

An appeal was granted, a citation issued, and the appeal was docketed in this court on June 5, 1914, as No. 514 on the docket for October Term, 1914, where it is at present pending.

This is a motion to advance this argument for immediate hearing.

REASONS FOR APPLICATION.

I.

The interests of the relator, Harry Kendall Thaw, require its immediate hearing.

The final decree of the district court, as has been set forth above, directs that the appeal shall act as a supersedeas and that during the pendency of said appeal the said petitioner, Harry Kendall Thaw, shall "remain in the custody of Holman A. Drew as keeper exercising Federal authority by virtue of this order with power to employ such assistants, if any, as he may deem necessary, unless otherwise ordered by some Court of the United States or Judge or Justice thereof," etc.

Under this provision of the decree a motion for bail was made before this court on June 8, 1914, in which motion it was prayed that Harry Kendall Thaw be permitted to go to Pittsburgh in the State of Pennsylvania. This motion for bail was refused by this court by a decree handed down on June 15, 1914. Harry Kendall Thaw, therefore, since that time and at the present time is in the aforesaid custody in the State of New Hampshire.

It is, therefore, submitted that justice and fairness require that the question whether or not Mr. Thaw is rightfully in custody under the warrant of extradition, issued by the Governor of New Hampshire, should be speedily determined one way or the other, so that if he is wrongfully deprived of his liberty, he should go free.

It would be seem to be, in the nature of a criminal case, which, under paragraph 3 of rule 26 of

this court, may be advanced by leave of court on motion of either party. See also section 253, Judicial Code of the United States, Act of Congress of March 3, 1911.

That the proceeding has a criminal character will be seen from the statement of facts leading up to Harry Kendall Thaw's escape, which appears under point II of this brief.

II.

The interests of the State of New York require the immediate hearing of the appeal.

While the nominal respondent in this proceeding is Holman A. Drew, as sheriff, it must be clear to the court that the real respondent is the State of New York, represented by its Attorney-General, acting on behalf of the People of New York who are interested in the return of Harry Kendall Thaw to Matteawan State Hospital; and this interest will be seen from a brief recital of the events which led up to the arrest and extradition of Harry Kendall Thaw:

On June 5, 1905, Stanford White, a citizen of the city of New York, was assassinated by Harry Kendall Thaw in the city of New York. He was thereafter indicted in the said county for the crime of murder in the first degree. Thereafter in January, 1907, he was brought to trial on said indictment and the jury disagreed. He was again placed on trial under the same indictment in the Supreme Court of New York county on January, 1908. He was acquitted on such trial by the jury *upon the ground of insanity*. He conceded upon the jury trials the killing, but his defense was that under the statutes of the State of New York relating to criminal responsibility, he was not responsible criminally for his act.

Thereupon the Supreme Court justice of the State of New York who presided at such trial made an order dated February 1, 1908, in which he ordered that the said Harry Kendall Thaw be detained in safe custody and be sent to Matteawan

State Hospital, there to be kept in said hospital until discharged by due course of law. This order was made under section 454 of the Code of Criminal Procedure of the State of New York (Laws 1881, chap. 442, as amended 1914), which section reads as follows:

> "When the defense is insanity of the defendant the jury must be instructed, if they acquit him on that ground, to state the fact with their verdict. The court must, thereupon, if the defendant be in custody, and they deem his discharge dangerous to the public peace or safety, order him to be committed to the state lunatic asylum, until he becomes sane."

Thereafter, upon this order he was taken to Matteawan State Hospital for safe custody and confinement. The Matteawan State Hospital is a State institution maintained by the State of New York for the incarceration and confinement of the following persons: "Such insane persons as may be committed to such institutions by courts of criminal jurisdiction, or transferred thereto by the State Commission in Lunacy, and for such convicted persons as may be declared insane while undergoing sentence of one year or less or for a misdemeanor at any of the various penal institutions of the State, and for all female convicts becoming insane while undergoing sentence." This institution is under the control and management of the Superintendent of State Prisons of the State of New York. The Attorney General of the State of New York is the constitutional attorney and legal adviser of the Superintendent of State Prisons and appears in addition in this

proceeding, not only on behalf of the State of New York, but on behalf of the Superintendent of State Prisons of the State of New York.

In May, 1908, Harry K. Thaw sued out a writ of habeas corpus before Supreme Court Justice Morschauser, and after a hearing said justice dismissed said writ and remanded the prisoner.

On June 26, 1908, a writ of habeas corpus was sued out on behalf of said Harry Kendall Thaw by A. Russell Peabody, one of his attorneys, before Mr. Justice Isaac M. Mills of the Supreme Court. The said justice dismissed said writ, no evidence having been offered by either side and the said Thaw was remanded to the Matteawan State Hospital. An appeal was taken from this order on behalf of Harry Kendall Thaw to the Appellate Division of the Second Department of the State of New York and to the Court of Appeals where said order was affirmed. The principal question involved in this appeal was the constitutionality of the aforesaid section 454 of the Criminal Code of the State of New York and the constitutionality and legality of Thaw's commitment to Matteawan. The case is found to be reported: 133 App. Div. 159; 196 N. Y. 525. Thereupon, as we are informed and believe, an application for a writ of error to be issued out of this court was made before Mr. Justice McKenna and said application for a writ of error was denied.

In June, 1909, another writ of habeas corpus was sued out on behalf of Harry Kendall Thaw before Mr. Justice Isaac M. Mills, justice of the Supreme Court. An extended hearing involving the hearing of seventy-seven witnesses was had upon the hearing of this writ, principally upon the question whether or not Harry Kendall Thaw

had recovered his sanity. On August, 1909, Mr. Justice Mills dismissed said writ and remanded Thaw to Matteawan Hospital, stating that in his opinion "The enlargement of Harry Kendall Thaw now would be dangerous to the public safety and peace and, therefore, cannot be permitted." The opinion of Mr. Justice Mills may be found in 118 N. Y. Supp. 388.

In the spring of 1912 another writ of habeas corpus was sued out on behalf of Harry Kendall Thaw before Mr. Justice Keogh of the Supreme Court. An extended hearing was had before said justice under said writ at White Plains, New York, principally upon the question as to whether Harry Kendall Thaw had recovered his sanity; and on July 26, 1912, Mr. Justice Keogh dismissed said writ and remanded the said Harry Kendall Thaw to Matteawan. Thaw thereafter continued in custody at Matteawan State Hospital under the aforesaid order of the Supreme Court of the State of New York until August 17, 1913.

On Sunday, August 17, 1913, Harry Kendall Thaw, with the help of certain other persons and in violation of the laws of the State of New York and of the statutes above set forth, effected his escape from Matteawan State Hospital in an automobile. Subsequently, on September 19, 1913, he was arrested in the Dominion of Canada, Province of Quebec, at the town of Coaticook. Subsequently, he was deported by the immigration authorities of the Dominion of Canada to the frontier of the State of Vermont on September 10, 1913, and upon that day he was arrested by the respondent herein, Holman A. Drew, as a fugitive from justice in the State of New Hampshire and lodged in Colbrook, New Hampshire, for custody.

Thereupon followed the extradition proceedings above set forth and thence followed this proceeding.

It will be clear to the court from this bare recital of the facts relating to the history of Harry Kendall Thaw in the State of New York, how vitally the public interests of that State are involved in this proceeding and why it is that it asks an immediate argument and hearing of this appeal. Here we have a man who avoided the extreme penalty of murder by a defense of insanity and who under the statutes in such cases made and provided was lodged in a State institution under an order of the Supreme Court of the State of New York, from which he made repeated efforts to get out, employing the courts and administration of justice in that State; and then, when unsuccessful, by a criminal conspiracy, effected his escape into the Dominion of Canada and was thence deported into the State of New Hampshire where he was arrested as aforesaid.

The course of the history of Harry Kendall Thaw has been provocative of scandal in the State of New York, and the question which has arisen, in which the People of the State of New York are interested and in which the officials who act upon their behalf in this matter, constitutionally and legally, are interested, is whether or not the laws of the State of New York, duly administered, may be violated and set aside by Harry Kendall Thaw or by persons acting on his behalf and in his interest.

It is now more than a year ago since Harry Kendall Thaw unlawfully effected his escape from Matteawan State Hospital and he is still sojourn-

ing in the State of New Hampshire to the scandal of the State of New York. It is the earnest desire of the People of the State of New York, as well as the officials acting in their behalf, that this scandal cease and that Harry Kendall Thaw be immediately returned to the custody of Matteawan State Hospital under the order aforesaid made by its Supreme Court, so that it may not be said that the power or influence or means of Harry Kendall Thaw or those acting in his interest or behalf is so powerful that they can subvert the due administration of the laws of the State of New York.

Also we would like to call the attention of this honorable court to the fact that the State of New York is the real party in this proceeding and that under the United States statutes it is entitled to a preference to any civil case pending in this court between private parties.

Therefore, it is respectfully prayed on behalf of the respondent and appellant herein, and on behalf of the State of New York, that this honorable court advance the hearing of the present appeal, setting it down for argument immediately or as soon thereafter as the convenience of this honorable court will permit.

Dated, Albany, N. Y., September 15, 1914.

Respectfully submitted,

THOMAS CARMODY,
Attorney General, State of New York.

JAMES A. PARSONS,
WILLIAM TRAVERS JEROME,
FRANKLIN KENNEDY,
Of Counsel.

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IN THE

Supreme Court of the United States

No. 514 OCTOBER TERM, 1914.

HOLMAN A. DREW, as Sheriff of Coos County, New Hampshire, Appellant.

vs.

HARRY KENDALL THAW, Appellee.

Appellee's Answer to Motion to Advance.

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vs.

HARRY KENDALL THAW, Appellee.

Appellee's Answer to Motion to Advance.

Harry Kendall Thaw, not admitting the right of Holman A. Drew, the appellant, or the State of New York, to appeal from the decision of the District Court of New Hampshire in this case, joins in the request that the case be advanced.

Harry Kendall Thaw, the Appellee in this case, cannot join in, but protests against, the second assigned reason in the motion of the Appellant, the Appellee having been committed to the Matteawan State Hospital under the New York Laws directing his confinement after acquittal of a criminal charge, if the Court deem his discharge dangerous to the public peace or

safety, since it is not apparent here, while he is in custody in the State of New Hampshire, as alleged in the motion to advance, that the peace or safety of New York is likely to be broken or impaired.

Moreover, the Appellee rejects without comment, the averment that this case should be advanced so that it may not be said, as averred in the Petition to Advance, that the power, or influence, or means of Harry Kendall Thaw or those acting in his interest or behalf, is so powerful that they can subvert the due administration of the laws of the State of New York.

MERRILL SHURTLEFF,
Lancaster, N. H.

WILLIAM A. STONE,
Pittsburgh, Pa.
Attorneys for Appellee.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 514.

HOLMAN A. DREW, Sheriff of Coos County, State of New Hampshire,

Appellant,

against

HARRY KENDALL THAW,

Appellee.

Appeal from the United States District Court, District of New Hampshire.

Brief of the Attorney General of the State of New York, on Behalf of the Appellant, Drew.

JAMES A. PARSONS,
WILLIAM TRAVERS JEROME,
FRANKLIN KENNEDY,
Counsel for Holman A. Drew,
Sheriff, &c., *Appellant.*

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Supreme Court of the United States.

HOLMAN A. DREW, Sheriff of Coos County, State of New Hampshire, Appellant, *against* HARRY KENDALL THAW, Appellee.	October Term, 1914. No. 514.

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK ON BEHALF OF THE APPELLANT.

Concise Statement of the Case.

This is an appeal directly to this Court from a final decree made in the District Court of the United States, District of New Hampshire, on May 8th, 1905, which final decree was made by the Hon. Edgar Aldrich, Judge of that Court (Final Decree, Record, p. 236).

This is a proceeding on habeas corpus begun in the District Court of the United States, District of New Hampshire, to inquire into the cause of the imprisonment and detention of Harry Kendall Thaw.

The first writ of habeas corpus was issued by the Hon. Edgar Aldrich, United States District Judge, District of New Hampshire, at Concord in said District, on the 13th day of September, 1913

(Record, pp. 1-9). A return was made to such writ by Holman A. Drew, Sheriff of Coos County, State of New Hampshire, on September 16, 1913 (Record, pp. 9-12). The body of Harry Kendall Thaw was produced under this writ at Littleton, State of New Hampshire, on September 16, 1913, and a hearing had before the said Hon. Edgar Aldrich. Upon such hearing Judge Aldrich suspended the proceeding to await the issue and determination of the extradition proceedings for the return of Harry Kendall Thaw to New York, which were then pending (Record, pp. 12-36).

Harry Kendall Thaw was imprisoned by said Holman A. Drew on the tenth day of September on the charge of being a fugitive from justice from the State of New York for the crime of conspiracy. Following his arrest requisition papers were issued on the 12th day of September, 1913, by Martin H. Glynn, Acting Governor of the State of New York, asking that the said Harry Kendall Thaw be extradited to New York. These requisition papers were based upon an information sworn to by Edward A. Conger, District Attorney of Dutchess County, with the accompanying exhibits (Record, pp. 75-101).

On October 23, 1913, the said Harry Kendall Thaw, with others, was indicted by the Grand Jury of the County of New York, in the State of New York for the crime of conspiracy (Record, pp. 110-123), under Section 580 of the Penal Law of the State of New York (Chap. 88 of the Laws of 1909 as Amended, 1913).

This section among other things provides as follows:

"*Definition and Punishment of Conspiracy.*

"If two or more persons conspire:

"1. To commit a crime * * *.

"6. *To commit any act* injurious to the public health, to public morals, or to trade or commerce, or *for the perversion or obstruction of justice, or of the due administration of the laws.* (Italics ours.)

"Each of them is guilty of a misdemeanor."

Thereupon, on October 24, 1913, a new requisition was made by Martin H. Glynn, Governor of the State of New York, upon the Governor of the State of New Hampshire asking for the extradition of the said Harry Kendall Thaw to the State of New York, said requisition papers being based upon the aforesaid indictment (Record, pp. 103-114). A clerical error in these requisition papers required the issuance of a new requisition on November 6, 1913, based upon the same indictment (Record, pp. 115-127).

On November 8, 1913, the Governor of the State of New Hampshire, Samuel D. Felker, determined that under the Constitution and Laws of the United States, Harry Kendall Thaw should be extradited, and wrote an opinion to be found on pages 128 to 131 inclusive of the Record; and honored the extradition of the State of New York and issued his warrant of extradition, dated upon said date, duly executed, in which he directed that the said Harry Kendall Thaw be arrested and delivered to Fred C. Hornbeck, who was duly authorized to receive him in custody and convey him back to the said State of New York (Record, pp. 132-133).

The form of said warrant was as follows, viz.:

WARRANT OF EXTRADITION.

"STATE OF NEW HAMPSHIRE.

"The Governor of the State of New Hampshire to Holman A. Drew and the Sheriffs, under Sheriffs, and other officers of and in the several Cities and Counties of this State.

[SEAL.]
SAMUEL D. FELKER.

"*Whereas*, it has been represented to me by the Governor of the State of New York that Harry K. Thaw stands charged with the crime of conspiracy which he certifies to be a crime under the laws of said State committed in the County of New York in said State, and that he has fled from justice in said State and has taken refuge in the State of New Hampshire, and the said Governor of New York having, in pursuance of the Constitution and Laws of the United States, demanded of me that I shall cause the said Harry K. Thaw to be arrested and delivered to Fred C. Hornbeck who is duly authorized to receive him into his custody and convey him back to the said State of New York

"*And Whereas*, The said representation and demand is accompanied by copy of indictment whereby the said Harry K. Thaw is shown to have been duly charged with the said crime and with having fled from said State and taken refuge in the State of New Hampshire, which is duly certified by the said Governor of the State of New York to be authentic and duly authenticated;

"*Therefore*, You are required to arrest and secure the said Harry K. Thaw wherever he may be found within the State and afford him such opportunity to sue out a writ of habeas corpus as is prescribed by the laws of this State, and to thereafter deliver him into the custody of the said Fred C. Hornbeck to be

taken back to the said State of New York from which he fled, pursuant to the said requisition; and also to return this warrant and make return to the Governor of New Hampshire, within thirty days from the date hereof, of all your proceedings had hereunder and of all facts and circumstances relating thereto.

"*Given under my hand* and the seal of the State, at the Capitol, in Concord, this eighth day of November in the year of our Lord one thousand nine hundred and thirteen.

"By the Governor:

"(Signed) EDWARD N. PEARSON,
"Secretary of State."

Thereafter on November 18, 1913, a hearing was had in the habeas corpus proceedings, which had been suspended as aforesaid, at Concord in the District Court of United States, District of New Hampshire, before the Hon. Edgar Aldrich, Justice of that Court (Record, pp. 36-65). Upon that hearing, or following it, a supplemental petition for writ of habeas corpus was filed by the attorneys for Harry Kendall Thaw (Record, pp. 67-134); and a supplemental writ of habeas corpus was issued on November 18, 1913 (Record, pp. 134-135); and a return to said supplemental writ was filed by the respondent, Holman A. Drew, on November 22, 1913 (Record, pp. 136-139); and an answer was filed to such return on behalf of the respondent on November 28, 1913 (Record, pp. 139-140). The supplemental proceedings were required so as to cover the warrant of extradition of the Governor, which was issued as aforesaid on the 8th day of November, 1913, after the first writ of habeas corpus had been issued and after the proceedings had been begun.

Thereafter on May 8, 1914, the aforesaid Hon.

Edgar Aldrich made a final decree in such proceedings in which he ordered, adjudged and decreed as follows:

> "*Ordered, adjudged and decreed* that the writ of habeas corpus herein, issued on the 18th day of November, 1913, be sustained and that the petitioner herein Harry Kendall Thaw be discharged from custody under the extradition warrant issued by the Governor of the State of New Hampshire on the 8th day of November, 1913.
>
> "And said respondent, Holman A. Drew, by his attorneys, having filed herein an assignment of errors and petition for allowance of an appeal to the Supreme Court of the United States from the aforesaid order and decree, and for a certificate that there is probable cause for such an appeal, and complying with what is understood to be the requirements of the Act of March 10, 1908,
>
> "*I hereby certify* that there is probable cause for the allowance of an appeal herein from said order to the Supreme Court of the United States, which is hereby allowed, and it is
>
> "*Ordered*, that a duly authenticated transcript of the record, papers and proceedings upon which the said order and decree were made be sent to the Supreme Court of the United States, and it is further
>
> "*Ordered*, that said appeal operate as a supersedeas and that during the pendency of said appeal the said petitioner, Harry Kendall Thaw, remain in the custody of Holman A. Drew as keeper exercising Federal authority by virtue of this order with power to employ such assistants, if any, as he may deem necessary, unless otherwise ordered by some Court of the United States or Judge or Justice thereof, and that the said respondent, Holman A. Drew, file a bond for costs in the sum of

Five Hundred Dollars ($500), which bond is now presented and approved by the Court." (pp. 236-237 of Record).

He wrote an opinion to be found on pages 211-231, inclusive, of the Record.

Thereupon a petition for an appeal directly to this Court from such final appeal was made by Thomas Carmody, Attorney General of the State of New York, on behalf of the respondent herein, Holman A. Drew (Record, pp. 232-233). This appeal was taken under Section 238 of the Judicial Code Act, March 3, 1911, and under the authority of *Pierce* v. *Creey*, 210 U. S., 387.

Specification of the Errors Relied Upon by the Plaintiff-in-Error in this Court.

At the time of taking this appeal an assignment of errors was filed on May 8, 1914, in which the following assignment of errors in said final decree was alleged:

"*First.* In sustaining the writ of habeas corpus and discharging the petitioner, Harry Kendall Thaw, from custody under the extradition warrant issued by the Governor of the State of New Hampshire.

"*Second.* In holding that the petitioner, Harry Kendal Thaw, was not substantially charged with crime under Article IV, section 2, paragraph 2 of the Constitution of the United States.

"*Third.* In holding that the petitioner, Harry Kendall Thaw, was not a fugitive from justice under Article IV, section 2, paragraph 2 of the Constitution of the United States.

"*Fourth.* In holding that the process under which the petitioner, Harry Kendall Thaw, was held was not due process of law under

Article IV, section 2, paragraph 2 of the Constitution of the United States.

"*Fifth.* In holding that the warrant of extradition issued by the Governor of the State of New Hampshire was illegal, invalid and unwarranted under Article IV, section 2, paragraph 2 of the Constitution of the United States.

"*Sixth.* In holding that upon the whole record this case does not come within the provisions of the Constitution of the United States relating to extradition.

"*Seventh.* In not holding that the petitioner, Harry Kendall Thaw, was legally in custody under the warrant of extradition issued by the Governor of the State of New Hampshire.

"*Eighth.* In not dismissing the writ of habeas corpus and in not remanding the petitioner, Harry Kendall Thaw, to the proper custody for extradition to the State of New York.

"*Ninth.* Because upon the whole record the writ of habeas corpus should have been dismissed, the warrant of the Governor of the State of New Hampshire sustained and the petitioner, Harry Kendall Thaw, remanded to the proper custody for extradition to the State of New York.

"*Wherefore* said respondent prays that the order, decree and judgment sustaining said writ of habeas corpus and discharging the petitioner herein, Harry Kendall Thaw, be reviewed and reversed; that said writ of habeas corpus be dismissed and that said petitioner be remanded to the custody of the said Holman A. Drew, Sheriff of Coos County, New Hampshire, under the aforesaid warrant of the Governor of the State of New Hampshire for

extradition of the State of New York." (pp. 231-232 of Record).

An appeal was granted, a citation issued, and the appeal was docketed in this Court on June 5, 1914, as No. 514 on the docket for October Term, 1914, where it is at present pending.

POINT I.

The statute of the State of New York by virtue of which the original order was made under which Thaw was confined in the State Asylum for the Insane is constitutional and such confinement was not in violation of the Fourteenth Amendment of the Constitution of the United States as depriving him of his liberty without due process of law.

The Petitioner, in his "Supplemental Petition for a Writ of Habeas Corpus" as one of the grounds upon which he seeks his discharge alleges (Record, p. 71):

> "First. Section 454 of the Code of Criminal Procedure of the State of New York which provides that:
>
> 'When the defense is the insanity of the defendant, the jury must be instructed, if they acquit him on that ground, to state the fact with their verdict. The Court must, thereupon, if the defendant be in custody, and they deem his discharge dangerous to the public peace or safety, order him to be committed to the State Lunatic Asylum until he becomes sane,'
>
> is in conflict with the Sixth and Fourteenth Amendments of the Constitution of the United States and is unconstitutional and that

said order of Justice Victor J. Dowling is null and void."

The contention is that an order of the Supreme Court of the State of New York by which the Petitioner was committed to the State Asylum for the Insane was void because it was made under a statute which was in violation of the Constitution of the United States, and since such commitment was void, no crime was committed by the Petitioner in conspiring to set at naught its provisions by an escape from such asylum.

The Statute of the State of New York (Code of Criminal Procedure, Sec. 454) is claimed to be in violation of the Sixth and Fourteenth Amendments of the Constitution of the United States in that it permits a person acquitted after a trial upon a charge of crime to be committed to and detained in an insane asylum, in certain circumstances within which the Petitioner's case comes, without due process of law (Record, pp. 68, 71).

From the record in the case at bar it appears that the petitioner was tried in the Supreme Court of the State of New York for the crime of homicide, and was on the 1st day of February, 1908, acquitted by the jury upon the ground of insanity (Record, pp. 68, 106, 107).

Long prior to that time, at that time and since, the Code of Criminal Procedure of the State of New York, Section 454, provided as follows, viz.:

> "When the defense is insanity of the defendant, the jury must be instructed, if they acquit him on that ground, to state the fact with their verdict. The Court must, thereupon, if the defendant be in custody, and they deem his discharge dangerous to the public peace or

safety, order him to be committed to the State Lunatic Asylum until he becomes sane."

Upon the Petitioner's acquittal by a jury of the charge of homicide upon the ground of insanity, the Supreme Court of the State of New York, in which the Petitioner had been tried, the Petitioner then being in custody, made the following order, viz.:

"The defendant on his trial on said indictment, having been acquitted by the jury on the ground of insanity, and the Court being certified of the fact, and the defendant being in custody, and the Court deeming his discharge at this time dangerous to public safety

"*It is ordered* that said Harry K. Thaw be detained in safe custody and be committed to the Matteawan State Hospital there to be kept in said hospital until thence discharged by due course of law" (Record, pp. 68, 106, 107).

When this order was made and ever since, the Statute of the State of New York, then and since in full force and effect, provided as follows, viz.:

CODE OF CIVIL PROCEDURE:

"Section 2015. *Who entitled to prosecute writs. Habeas corpus may issue on Sunday.*

"A person imprisoned or restrained in his liberty, within the State, for any cause, or upon any pretense, is entitled, except in one of the cases specified in the next section, to a writ of habeas corpus, or a writ of certiorari, as prescribed in this article, for the purpose of inquiring into the cause of the imprisonment or restraint, and, in a case prescribed by law, of delivering him therefrom. A writ of habeas corpus may be issued and served under this section, on the first day of the week, commonly called Sunday; but it cannot be made returnable on that day.

"Section 2016. *When neither writ shall be allowed.*

"A person is not entitled to either of the writs specified in the last section, in either of the following cases:

"1. Where he has been committed, or is detained, by virtue of a mandate, issued by a Court or a Judge of the United States, in a case where such Courts or Judges have exclusive jurisdiction under the laws of the United States, or have acquired exclusive jurisdiction by the commencement of legal proceedings in such a Court.

"2. Where he has been committed, or is detained, by virtue of the final judgment or decree, of a competent tribunal of civil or criminal jurisdiction; or the final order of such a tribunal, made in a special proceeding, instituted for any cause, except to punish him for a contempt; or by virtue of an execution or other process, issued upon such a judgment, decree, or final order.

"Section 2017. *How and to whom application for habeas corpus or certiorari made.*

"Application for the writ must be made, by a written petition, signed, either by the person for whose relief it is intended, or by some person in his behalf, to either of the following Courts or officers:

"1. The Supreme Court, at a Special Term or the Appellate Division thereof, where the prisoner is detained within the judicial district within which the term is held.

"2. A Justice of the Supreme Court, in any part of the State.

"3. An officer authorized to perform the duties of a Justice of the Supreme Court at chambers, being or residing within the county, where the prisoner is detained; or, if there is

no such officer within that city or county, capable of acting, or, if all those capable of acting and authorized to grant the writ, are absent, or have refused to grant it, then to an officer, authorized to perform those duties, residing in an adjoining county.

"Sec. 2019. *Contents of Petition.*

"The petition must be verified by the oath of the Petitioner, to the effect that he believes it to be true; and must state, in substance:

"1. That the person in whose behalf the writ is applied for, is imprisoned, or restrained in his liberty; the place where, unless it is unknown, and the officer or person by whom, he is so imprisoned or restrained, naming both parties, if their names are known, and describing either party, whose name is unknown.

"2. That he has not been committed, and is not detained, by virtue of any judgment, decree, final order, or process, specified in Section 2016 of this Act.

"3. The cause or pretense of imprisonment or restraint, according to the best knowledge and belief of the petitioner.

"4. If the imprisonment or restraint is by virtue of a mandate, a copy thereof must be annexed to the petition; unless the Petitioner avers, either, that by reason of the removal or concealment of the prisoner before the application, a demand of such a copy could not be made, or that such a demand was made and the legal fees for the copy were tendered to the officer or other person, having the prisoner in his custody, and that the copy was refused.

"5. If the imprisonment is alleged to be illegal, the petition must state in what the alleged illegality consists.

"6. It must specify whether the Petitioner applies for the writ of habeas corpus or for the writ of certiorari.

"Section 2020. *When writ must be granted; penalty for refusing.*

"A Court or a Judge, authorized to grant either writ, must grant it without delay, whenever a petition therefor is presented, as prescribed in the foregoing sections of this article unless it appears, from the petition itself, or the documents annexed thereto, that the petitioner is prohibited by law from prosecuting the writ. For a violation of this section, a Judge, or, if the application was made to a Court, each member of the Court, who assents to the violation, forfeits to the prisoner $1,000, to be recovered by an action in his name, or in the name of the Petitioner to his use.

"Section 2027. *Habeas corpus; body of prisoner to be produced, unless, etc.*

"The person, upon whom a writ of habeas corpus has been duly served, must also bring up the body of the prisoner in his custody, according to the command of the writ; unless he states, in his return, that the prisoner is so sick or infirm, that the production of him would endanger his life or his health.

"Section 2031. *Proceedings on return of habeas corpus.*

"The Court, or Judge, before which or whom the prisoner is brought by virtue of a writ of habeas corpus, issued as prescribed in this article, must, immediately upon the return of the writ, examine into the facts alleged in the return, and into the cause of the imprisonment or restraint of the prisoner; and must make a final order to discharge him therefrom, if no lawful cause for the imprisonment

or restraint or for the continuance thereof, is shown; whether the same was upon a commitment for an actual or supposed criminal matter, or for some other cause."

The "Insanity Law" of the State of New York (Laws of 1896, N. Y., Chapter 545), provided:

"Section 73. *Habeas corpus.*

"Anyone in custody as an insane person is entitled to a writ of habeas corpus, upon a proper application made by him or some friend in his behalf. Upon the return of such writ, the fact of his insanity shall be inquired into and determined. The medical history of the patient as it appears in the Case Book, shall be given in evidence, and the superintendent or medical officer in charge of the institution wherein such person is held in custody, and any proper person, shall be sworn touching the mental condition of such person.

"Section 99. *Convicts on recovery to be transferred to prison.*

"* * * Any inmate not a convict held upon an order of a Court or Judge, in a criminal proceeding, may be discharged therefrom, upon the superintendent's certificate of recovery, made to and approved by such Court or Judge."

These provisions of the Laws of 1896 were re-enacted in the same words in Sections 93 and 120 of the Laws of 1909 of New York, Chapter 32.

It appears, therefore, that at the time the Petitioner was committed to the State Asylum for the Insane by the order of the Supreme Court of the State of New York, he had the right at any time to sue out a writ of habeas corpus and upon the return to such writ, the right was his to have an immediate examination "into facts alleged in the

return" and into the cause of his imprisonment or restraint, and if he was unlawfully restrained, he had a right to be forthwith discharged from custody.

More than this. If the petitioner obtained a writ of habeas corpus and after the hearing and final order he felt that the decision against him was unjust, he had a right to appeal to the Appellate Division of the Supreme Court of the State of New York, a Court composed of five Justices of the Supreme Court sitting *in banc*.

> "Section 2058. *When appeal may be taken in cases under this article.*
>
> "An appeal may be taken from an order refusing to grant a writ of habeas corpus, or a writ of certiorari, as prescribed in this article, or from a final order, made upon the return of such a writ, to discharge or remand a prisoner, or to dismiss the proceedings. Where the final order is made, to discharge a prisoner, upon his giving bail, an appeal therefrom may be taken, before bail is given; but where the appeal is taken by the People, the discharge of the prisoner upon bail, shall not be stayed thereby. An appeal does not lie, from an order of the Court or Judge, before which or whom the writ is made returnable, except as prescribed in this section." (New York Code of Civil Procedure.)

After such an appeal, if he still felt injustice had been done him, he could appeal to the Court of Appeals of the State of New York, a Court composed of seven Judges sitting *in banc*.

> "New York Code of Civil Procedure.
>
> "Section 190. *The Jurisdiction of the Court of Appeals in civil actions.*
>
> "The Court of Appeals has exclusive juris-

diction to review upon appeal every actual determination made prior to the last day of December, 1895, at a general term of the Supreme Court, or by either of the Superior City Courts, as then constituted, in all cases in which, under the provisions of law existing on said day, appeals might be taken to the court of appeals. From and after the last day of December, 1895, the jurisdiction of the court of appeals shall, in civil actions and proceedings, be confined to the review upon appeal of the actual determinations made by the appellate division of the supreme court in either of the following cases, and no others:

"1. Appeals may be taken as of right to said court, from judgments or orders finally determining actions or special proceedings, and from orders granting new trials on exceptions, where the appellants stipulate that upon affirmance, judgment absolute shall be rendered against them. * * *

"Section 3333. *Definition of 'action.'*

"The word 'action,' as used in the New Revision of the Statutes, when applied to judicial proceedings, signifies an ordinary prosecution, in a court of justtice, by a party against another party, for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense.

"Section 3334. *Id.: 'Special Proceeding':*

"Every other prosecution by a party, for either of the purposes, specified in the last section, is a special proceeding."

If his constitutional rights under the Constitution of the United States were believed by him to be involved, and to have been violated, the Petitioner had the further remedy of a writ of error to the Supreme Court of the United States.

When the order of commitment above quoted (p. 11) was made, the Petitioner was removed and delivered into custody of the Asylum Authorities under such order (Record, p. 69), and almost immediately he sought to enforce what he esteemed his right to freedom upon the ground of his then sanity by invoking the remedies afforded him by the Laws of the State of New York above quoted.

From the Supplemental Petition herein, it appears that in May, 1908, again in June, 1909, and still again in June, 1912, the Petitioner tested the legality of his confinement by writs of habeas corpus, granted by the Supreme Court of the State of New York, and in each case, and each time before a different Justice of the Supreme Court, after a hearing the Court refused to discharge the Petitioner from his confinement in the State Asylum for the Insane, and decided that Petitioner "had not become sane and was not sane" (Record, p. 69).

From the foregoing it appears that at all times after his commitment to the State Asylum for the Insane, the Petitioner at any time was entitled on his own motion or that of any friend to have his day in court with all that "due process" of law implies, for all this is provided for by the law of the State of New York in hearings in habeas corpus proceedings, and that on three occasions he availed himself of his rights and pursued the remedies provided by the laws of the State of New York.

We do not understand that this is disputed by the Petitioner or his counsel, but they claim that, although all the rights and remedies above-mentioned were the Petitioner's after his commitment, they amount to nothing in point, since the Petitioner was committed and detained without "due

process of law," or, as is stated in the supplemental petition herein, at page 68 of the Record:

> "4. That no trial or inquiry was had by a judge, jury or committee of inquiry to determine whether at the time said Justice Dowling made such order, your Petitioner was insane or unsafe to be at large."

On behalf of the Petitioner it is contended that upon the acquittal of the charge of homicide upon the ground of insanity before he could constitutionally be committed to the Asylum for the Insane a new proceeding must be had, as to the nature, the time, and the place of which he should have had notice and an opportunity should have been given him to be heard, and that any commitment could only lawfully be made upon evidence had in such a new proceeding after full opportunity to the Petitioner to produce evidence in his own behalf and to be heard in opposition.

The precise question involved has been judicially passed upon in a habeas corpus proceeding brought in the Courts of the State of New York on behalf of the Petitioner herein (Record, pp. 148, 149), and determined adversely to his contention.

In 1908, while the Petitioner herein was still in confinement in the State Asylum for the Insane under the order of the Supreme Court of the State of New York above quoted (Record, pp. 106, 107), a writ of habeas corpus was sued out in his behalf in the Supreme Court of the State of New York and upon the return thereto the question of the constitutionality of the New York Statute, under which the Petitioner was held, was litigated as well as the form of the commitment and the right to a trial by jury.

The Supreme Court at Special Term, one Justice

sitting, dismissed the writ and remanded the Petitioner herein to the custody whence he was produced, overruling his objections on constitutional grounds to the statute (Sec. 454, New York Code of Criminal Procedure, *supra*, p. 94), and holding the form of commitment sufficient and that he was not entitled to a trial by jury. An appeal was taken to the Appellate Division of the Supreme Court from the order entered below dismissing the suit and remanding the Petitioner herein. Upon this appeal the decision of the Court below was confirmed by a vote of four of the Justices to one (Mr. Justice Gaynor), Justices Jenks and Rich each writing opinions for affirmance and Mr. Justice Gaynor delivering a dissenting opinion.

The report in the Appellate Division of the Supreme Court will be found under the title, "People *ex rel.* Peabody *v.* Chanler, Sheriff, etc., Respondents; Harry K. Thaw, and Charles Morschauser, etc., Appellants, in Volume 133 at page 159 *et seq.*, New York Appellate Division Reports.

Thereafter a further appeal was taken by the Petitioner herein from the decision of the Appellate Division of the Supreme Court to the Court of Appeals of the State of New York and upon such appeal the decision of the Appellate Division of the Supreme Court was affirmed without dissent upon the opinions rendered below by Justices Jenks and Rich, six Judges of the Court of Appeals concurring.

The decision of the Courts of Appeal is reported in 196 New York, 525.

Thereafter, as counsel are informed, application was made to Mr. Justice McKenna of the Supreme Court of the United States for the allowance of a writ of error on behalf of the Petitioner herein,

but such application was denied (Record, pp. 148, 149).

The opinions of Justices Jenks and Rich in support of the constitutionality of the process under discussion are to be found in 133 App. Div. (New York), 159; their reasoning is so forceful and convincing that counsel feel that they cannot improve on it or add anything of value to it. At the same time these opinions address themselves so entirely to the point that it is impracticable to cite them except *in extenso*.

Rather than burden this Court by a re-statement in our own words of the reasoning found in these opinions, we have printed them in full as an appendix to this brief and rest in the belief that upon the Point under discussion they will be found absolutely convincing.

In addition to

> *People ex rel. Peabody* v. *Chanler, Sheriff, etc.*, 133 App. Div. (N. Y.), 159; 196 N. Y., 525,

the attention of the Court is called to

> *Hadfield's Case*, Howell's State Trials (1800), Case No. 646, Volume 27, page 1282,

and to

> *United States* v. *Lawrence*, 4 Cranch, C. C., 518;

cases which show that at the Common Law upon the acquittal of a defendant, whose immediate release appeared to the Trial Court as unsafe because of his insanity, the Court, without further or separate inquiry, had power, and did remand

the defendant to custody to be dealt with as the law might require. The English Statute, 39 and 40 George III, Chapter 94, referred to by Cranch, C. J., in United States v. Lawrence, *supra*, was the source from which Section 454 of New York Code of Criminal Procedure was derived.

The decision in People *ex rel.* Peabody *v.* Chanler, Sheriff, etc., *supra*, has been examined and followed in

In re Clark (1912), 86 Kan., 539.

It is not deemed necessary to discuss the authorities, some of them cited below by Petitioner's counsel, which upon a casual examination seem to be in conflict with People *ex rel.* Peabody *v.* Chanler, Sheriff, etc., *supra*, because they are readily distinguished from the case at bar.

In none of them did the person committed have the immediate rights and remedies of review which the Petitioner herein had and of which he availed himself.

POINT II.

What the State of New York does not claim as a basis for the interstate rendition of the Petitioner.

It would not have been considered necessary by counsel for the appellant to have suggested this discussion, had not the Court below showed throughout its opinion a misconception of what the exact basis was upon which the interstate rendition of the petitioner was sought.

1. It is not claimed that any right exists on the part of the State of New York to recover, in interstate rendition proceedings, custody of the person of Harry K. Thaw, upon the ground that he is an insane person who has escaped from the custody of the State of New York, his legally appointed guardian.

2. It is not claimed, in the interstate rendition proceedings under discussion, that to escape from the Matteawan State Hospital in the State of New York, after being committed thereto in the manner in which the Petitioner was committed, was a crime under the laws of the State of New York.

3. The Petitioner has not been indicted in the State of New York for escaping from the Matteawan State Hospital, nor for a conspiracy to commit a crime.

A reference to pages 106 to 109 of the Record shows that the indictment is for conspiracy to pervert and obstruct justice and the due administration of the law.

A conspiracy of this nature is a crime, under the laws of the State of New York.

Section 580, Penal Law, State of New York, provides:

> "If two or more persons conspire:
>
> "1. To commit a crime; or,
>
> "* * *
>
> "6. To commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice, or of the due administration of the laws,
>
> "Each of them is guilty of a misdemeanor."

Section 583, Penal Law, State of New York, provides:

> "No agreement except to commit a felony upon the person of another, or to commit arson or burglary, amounts to a conspiracy, unless some act beside such agreement be done to effect the object thereof, by one or more of the parties to such agreement."

Section 398, Code of Criminal Procedure, State of New York, provides:

> "Upon a trial for a conspiracy, in a case where an overt act is necessary to constitute the crime, the defendant cannot be convicted, unless one or more overt acts be expressly alleged in the indictment, nor unless one or more of the acts alleged be proved; but any other overt act, not alleged in the indictment, may be given in evidence."

Such a conspiracy may be prosecuted in any county of the State wherein any part of the crime is committed or any of "the acts or effects thereof,

constituting or requisite to the consummation of the offense" occur.

Section 134, Code of Criminal Procedure, State of New York, provides:

> "When a crime is committed, partly in one county and partly in another, or the acts or effects thereof, constituting or requisite to the consummation of the offense, occur in two or more counties, the jurisdiction is in either county."

An examination of the indictment (pp. 106 *et seq.*, Record), shows that the escape from Matteawan State Hospital is alleged, among other acts, as an overt act necessary to be alleged under the law of the State of New York.

The escape from Matteawan State Hospital is only one of the overt acts alleged. It might be entirely stricken from the indictment and the indictment be good, as shown by the above quotations; and, upon a trial under this indictment, it would not be necessary to introduce any evidence in respect to the escape to justify a conviction.

It was not a crime under the Statutes of New York to escape from an asylum for the insane in the circumstances in which the Petitioner escaped. He, therefore, could not be indicted for the escape; nor could he be indicted for a conspiracy to commit a crime. But to escape was unlawful, though not criminal, and to conspire to effect the Petitioner's escape was to conspire "to commit an act," "for the perversion or obstruction of justice," and "of the due administration of the laws," and it was for such a conspiracy that he was indicted.

POINT III.

Every element required by the Constitution and statutes of the United States as a prerequisite to interstate rendition exists in the case at bar.

These elements are four in number, viz.:

First. The identity of the person sought to be extradited with the person named in the requisition and accompanying papers.

Second. That such person should have fled from the justice of the demanding State.

Third. A demand made for the delivery to the State wherein he is charged with crime in the form prescribed by the statutes of the United States.

Fourth. That the person sought to be extradited be charged in the demanding State with treason, felony or other crime.

> Constitution of the United States, Article IV, Section 2, Paragraph 2.
> United States Revised Statutes, Section 5278.
> *Pierce* v. *Creey* (1907), 210 U. S., 401.

First. The identity of the person.

It is not understood that any contention is made that the Harry K. Thaw mentioned in the requisition of the Governor of the State is not the Harry K. Thaw under arrest in the State of New Hampshire as a fugitive from justice (see Record, pp. 68, 69, 70 and 71).

Second. The prisoner is a fugitive from justice.

What constitutes a fugitive from justice within the meaning of the Constitution and statutes of the United States has been clearly defined by the Supreme Court of the United States.

In *ex parte Reggel*, 114 U. S., 642, the Supreme Court of the United States (1884), says:

> "In other words, the appellant was entitled, under the act of Congress, to insist upon proof that he was within the demanding State at the time he is alleged to have committed the crime charged, and subsequently withdrew from her jurisdiction, so that he could not be reached by her criminal process."

In *Roberts* v. *Reilly*, 116 U. S., 80 (1885), the Supreme Court defined a fugitive from justice within the meaning of the Constitution and statutes of the United States in regard to the extradition, as follows:

> "To be a fugitive from justice, in the sense of the act of Congress regulating the subject under consideration, it is not necessary that the party charged should have left the State in which the crime is alleged to have been committed, after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun; but simply that having, within a State, committed that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process, to answer for his offense, he has left its jurisdiction and is found within the territory of another."

It is not understood that any contention is made that Harry K. Thaw was not in the State of New York at the time of the commission of the crime alleged (see Record, pp. 68, 69, 70 and 71).

In *Appleyard* v. *Massachusetts* (1906), 203 U. S., 222, the Supreme Court says (p. 226):

"But the appellant contended below, as he does here, that he had no *belief* when leaving New York at any time that he had violated its criminal laws, and therefore, within the meaning of the Constitution and Laws of the United States, he could not be deemed a fugitive from justice. This contention cannot be sustained; indeed, it could not be sustained without materially impairing the efficacy of the constitutional and statutory provisions relating to fugitives from justice. An alleged fugitive may believe that he has not committed any crime against the laws of the State in which he is indicted, and yet, according to the laws of such State, as administered by its judicial tribunals, he may have done so, and his belief, or want of belief, may be without foundation in law. * * * So that the simple inquiry must be whether the person whose surrender is demanded is in fact a fugitive from justice, not whether he *consciously* fled from justice in order to avoid prosecution for the crime with which he is charged by the demanding State. A person charged by indictment or by affidavit before a magistrate with the commission within a state of a crime covered by its laws, and who, after the date of the commission of such crime, leaves the state—no matter for what purpose or with what motive, nor under what belief—becomes, from the time of such leaving, and within the meaning of the Constitution and the Laws of the United States, a fugitive from justice, and if found in another state must be delivered up by the Governor of such state to the state whose laws are alleged to have been violated, on the production of such indictment or affidavit, certified as authentic by the Governor of the state from which the accused departed. Such is the command of the supreme law of the land, which may not be disregarded by any state."

See also

Ex parte Hoffstot (1910), 180 Fed. Rep., 240; 218 U. S., 665.

Yet the learned Judge in these proceedings in the Court below, in the face of the case last above cited, held that the Petitioner in these proceedings was not a fugitive from justice within the meaning of the Constitution and Statutes of the United States, apparently because he thought that the Petitioner in his flight was not consciously endeavoring to escape from the consequences of his acts. In its opinion, the Court below says:

> "In a case like this, where the elements must be substantially established, the constitutional element of flight must have some causal relation to the specific crime alleged as the ground for invoking the constitutional power of extradition."

And again:

> "Under reasonable inference, upon the face of the papers from New York's description of the escape, in every sense save an extremely fictional one, the flight was from Matteawan environment, not from the crime of escaping and fleeing from environment." (Record, p. 226.)

Third. The demand for the delivery to the State wherein he is charged with crime exists and is in proper form.

Reference to the requisition of the Governor of the State of New York made upon the Governor of the State of New Hampshire will show that such requisition is in strict compliance with the provisions of the Revised Statutes of the United States, and with the practice now practically uni-

form throughout the States in matters of interstate rendition, and that it is plain therefrom that the demand is made by the executive of the State of New York upon the executive of the State of New Hampshire for the delivery of Harry K. Thaw to the authorities of the State of New York upon the ground that he is a fugitive from the justice of the State of New York.

See Record, page 115 to 127.

Fourth. It appears conclusively from the requisition of the Governor of the State of New York that the Petitioner is charged in the State of New York with crime.

The Statutes of the State of New York under which the indictment in these proceedings was found are set forth at large on pages 24 and 25 of this brief.

Reference being had to the requisition of the Governor of the State of New York and the accompanying papers, it will appear that the Petitioner was detained in the Matteawan State Hospital, from which he escaped on the 17th day of August, 1913, by virtue of an order of the Supreme Court of the State of New York, which order is in words following:

> "At a Trial Term, Part I, of the Supreme Court of New York, holden in and for the County of New York, in the First Judicial District of said State, for the trial of Criminal Actions, at the Building for Criminal Courts in said County, on Saturday, the first day of February, in the year of our Lord one thousand nine hundred and eight.
>
> "Present: The Hon. Victor J. Dowling, Justice of the Supreme Court of the State of New York.

"*The People of the State of New York* against *Harry K. Thaw.*

"The defendant on his trial in said indictment having been acquitted by the jury on the ground of insanity, and the Court being certified of the fact, and the defendant being in custody, and the Court deeming his discharge at this time dangerous to public safety, it is

"Ordered, that said Harry K. Thaw be detained in safe custody and be sent to the Matteawan State Hospital there to be kept in said hospital until thence discharged by due course of law.

"It is further ordered that the Sheriff of the County of New York do forthwith convey said Harry K. Thaw to said hospital.

"Enter,

"VICTOR J. DOWLING,

"Justice of the Supreme Court of the

"State of New York."

(Record, pp. 106 and 107.)

This order was made by the authority of Section 454 of the New York Code of Criminal Procedure, which reads as follows:

> "Section 454. When the defense is insanity of the defendant the jury must be instructed, if they acquit him on that ground, to state the fact with their verdict. The Court must thereupon, if the defendant be in custody, and they deem his discharge dangerous to the public peace or safety, order him to be committed to the State Lunatic Asylum, until he becomes sane."

It will be noted that this order committing Thaw, committed him to the hospital "until thence discharged by due course of law." What is due course of law in the State of New York in such circumstances, is very clear. By Section 120 of the In-

sanity Law of the State of New York, in regard to such cases as that of Thaw, it is provided as follows:

> "Any inmate not a convict, held upon an order of a Court or Judge, in a criminal proceeding, may be discharged therefrom, upon the Superintendent's certificate of recovery, made to and approved by such Court or Judge."

And by Section 93 of the same law, it is provided as follows:

> "Anyone in custody as an insane person is entitled to a writ of habeas corpus, upon a proper application made by him or some friend in his behalf. Upon the return of such writ, the fact of his insanity shall be inquired into and determined. The medical history of the patient, as it appears in the case book, shall be given in evidence, and the superintendent or medical officer in charge of the institution wherein such person is held in custody, and any proper person shall be sworn touching the mental condition of such person."

As these are the only methods known to the law of the State of New York by which Thaw could lawfully be discharged, any conspiracy to effect his discharge in another manner must of necessity be a conspiracy to do an unlawful act and one "for the perversion or obstruction of justice or of the due administration of the laws."

The papers accompanying the requisition show clearly and unmistakably that such a conspiracy existed, namely, to effect the illegal escape of Thaw and that Thaw participated in such conspiracy, and by means of it escaped from the State Asylum at Matteawan.

No one, we believe, can with propriety seri-

ously contend that the acts charged were other than a perversion or obstruction of justice or of the due administration of the laws. It is contended, however, that inasmuch as Thaw was confined in an asylum for the insane, the requisition papers on their face disclose that Thaw was incapable of committing a crime because of his insanity, and that therefore the requisition does not comply with the requirements of the Constitution and Statutes of the United States in that the commission of a crime in the demanding State is not shown. Such a contention is based upon an entire misconception of the law in relation to insanity as a defense to a charge of crime, and is the subject of discussion in "Point IV" (*infra*), of this brief.

The State of New York provided a legal procedure for the commitment to custody of persons adjudged insane and a method of legal procedure for their release when they became sane. Under this procedure the person having the custody of a person adjudged insane had a right (and it was his duty) to restrain the person adjudged insane until such person was discharged by the legal procedure prescribed by the laws of the State of New York. For restraining the person adjudged insane no action for false imprisonment would lie. The person having the custody of the person adjudged insane could lawfully have used any degree of violence to protect such custody against all persons seeking to violate it; could have justified even taking human life in its defense.

The Petitioner was in lawful custody, a custody lawfully to be defended by his custodian by the use of force either against the Petitioner or others, and two ways were provided by law for his proper release, either way being adequate to protect him

from injustice. In these circumstances it certainly is not "due administration of the laws" to take him from his custodian without any legal process and in the manner described in the indictment, and it is equally certain that to conspire to take him from custody in the way described in the indictment is to conspire "to commit an act * * * for the perversion or obstruction * * * of the due administration of the laws."

POINT IV.

The requisition and accompanying papers charge the commission of a crime, even though they disclose that the Petitioner, at the time of the commission of the crime alleged, was confined in an asylum for the insane.

First.—The law of the demanding State controls.

Commonwealth of Kentucky v. *Dennison, Governor*, etc. (1860), 24 How., U. S., 66.

Ex parte Reggel (1885), 114 U. S., 642.

In this latter case it is said by the Supreme Court, at page 650:

> "It is within the power of each State, except as her authority may be limited by the Constitution of the United States, to declare what shall be offenses against her laws and citizens of other States, when within her jurisdiction, are subject to those laws. In recognition of this right so reserved to the States, the words of the clause in reference to fugitives from justice were made sufficiently comprehensive to include every offense against the laws of the demanding State, without exception as to the nature of the crime."

Second.—The New York Law.

Section 1120, Penal Law, State of New York, provides as follows:

> "An act done by a person who is an idiot, imbecile, lunatic or insane is not a crime. A person cannot be tried, sentenced to any punishment or punished for a crime while he is in a state of idiocy, imbecility, lunacy or insanity so as to be incapable of understanding

> a proceeding or making his defense. A person is not excused from criminal liability as an idiot, imbecile, lunatic, or insane person, except upon proof that, at the time of committing the alleged criminal act, he was laboring under such a defect of reason as: (1) not to know the nature and quality of the act he was doing; or, (2) not to know that the act was wrong."

Section 815, Penal Law, State of New York, provides as follows:

> "A person is presumed to be responsible for his acts. The burden of proving that he is irresponsible is upon the accused person, except as otherwise prescribed in this chapter."

Section 34, Penal Law, State of New York, provides:

> "A morbid propensity to commit prohibited acts, existing in the mind of a person who is not shown to have been incapable of knowing the wrongfulness of such acts, forms no defense to a prosecution therefor."

These provisions of the Penal Law of the State of New York are derived from the former Penal Code of the State of New York, which, in turn, was partially derived from the provisions of the Revised Statutes of the State of New York. Thus, Section 815 of the Penal Law was derived from Section 17 of the Penal Code, and Section 1120 of the Penal Law was derived from Sections 20 and 21 of the Penal Code. These provisions of law have frequently been the subject of construction and interpretation by the Courts of the State of New York, and the Court of Appeals of the State of New York, in the case of *People* v. *Taylor* (1893), 138 N. Y., 398, a leading case in the State

of New York, and one unreversed, uncriticized and always followed when applicable says:

> "The provision of the Revised Statutes, which declared that 'no act done by a person in a state of insanity can be punished as an offense,' was abrogated by the Penal Code, which provided (Sec. 17), that responsibility is to be presumed, and the burden of disproving it is upon the accused, and (Sec. 21), that he cannot be excused from criminal liability as an insane person, except upon proof that at the time of committing the alleged criminal act he was laboring under such a defect of reason as either not to know the nature and quality of the act he was doing, or that the act was wrong. Partial insanity, or incipient insanity, is not sufficient, if there is still the ability to form a correct perception of the legal quality of the act and to know that it is wrong. If, when a specific act is contemplated, he has the power to know whether it is wrong to do it and right to refrain from doing it, the law presumes that he has also the power to choose between the right and the wrong course of action, and will not permit either Courts or juries to speculate as to its possible non-existence."

It would be easy to quote numerous other decisions in the Courts of the State of New York, interpreting the law as above laid down and citing and following this case, but the case itself is the leading case upon the subject and controlling upon the Courts of the State of New York.

It might not be amiss, however, to quote from the opinion of the Court of Appeals in the case of *People* v. *Silverman* (1905), 181 N. Y., 240. This was a capital case, and the Court, by Cullen, C. J., at page 240, said:

"Whatever may be the opinion of physicians or medical experts on the subject, there is but one test of responsibility known to the law, that found in Section 21 of the Penal Code, which is but a statutory declaration of the law, as it had long prevailed: 'A person is not excused from criminal liability as an idiot, imbecile, lunatic, or insane person, except upon proof that, at the time of committing the alleged criminal act, he was laboring under such a defect of reason as either, (1), not to know the nature and quality of the act he was doing; or, (2), not to know that the act was wrong.' An examination of the evidence affords no reason for doubt that the defendant both knew the nature and quality of the act done by him and that the act was wrong. Whatever may have been his eccentricity of conduct, or however abnormal his disposition, there was no impairment of reason affecting his knowledge on this subject, and he was, therefore, justly held by the jury to be responsible for his crime."

See also:

People v. *Cain* (1912), 20 N. Y., 202.

Third.—The Federal Law.

In *U. S.* v. *Ridgeway* (1887), 31 Fed. Rep., 144, Judge Spear charged the jury as follows upon the subject of insanity:

"The rule may be fairly stated to be this: If he possesses that degree of mental intelligence which enables him to distinguish between right and wrong as to the particular matter or matters involved in the charge of crime for which he is on trial, he is held by the law responsible for his actions, notwithstanding he may have suffered generally from delusions, and that he may be the victim of manias on other subjects which do not affect

or relate to the matter about which he is accused * * *. You will observe that those men who have manias upon certain subjects, and yet who are capable of distinguishing between right and wrong as to the crimes they may commit, will be exceedingly dangerous men to society if they are permitted by the Courts of the country to escape because they may be mentally disordered in other respects. The test is a practical one, a reasonable one and one which I am quite sure you understand. It is in this case possession of that degree of mental soundness which will enable the prisoner to distinguish right from wrong in the matter of illicit distilling. If so, it is your duty to find him guilty; if not, it is your duty to acquit him."

In the case of *Guiteau*, 10 Fed. Rep., 161, Judge Coxe charged the jury, among other things, as follows:

"Now, it is first to be observed that we are not troubled in this case with any question about what may be called total insanity, such as raving mania, or absolute imbecility, in which all exercise of reason is wanting, and there is no recognition of persons or things, or their relations. But there is a debatable border line between the sane and the insane, and there is often great difficulty in determining on which side of it a party is to be placed. There are cases in which a man's mental faculties generally seem to be in full vigor, but on some one subject he seems to be deranged. He is possessed, perhaps, with a belief which everyone recognizes as absurd, which he has not reasoned himself into and cannot be reasoned out of, which we call an insane delusion, or he has, in addition, some morbid propensity, seemingly in harsh discord with the rest of his intellectual and moral nature. * * * You must bear in mind that a man

does not become irresponsible by the mere fact of being partially insane. Such a man does not take leave of his passions by becoming insane, and may retain as much control over them as in health. He may commit offenses, too, with which his infirmity has nothing to do. He may be sane as to his crime, understand its nature, and be governed by the same motives in regard to it as other people; while on some other subject, having no relation to it whatever, he may be subject to some delusion. * * * The first thing, therefore, to be impressed upon you is, that wherever this partial insanity is relied on as a defense, it must appear that the crime charged was the product of the delusion, or other morbid condition, and connected with it as effect with cause, and not the result of sane reasoning or natural motives, which the party may be capable of, notwithstanding his circumscribed disorder."

Numerous other cases might be cited in the Federal Courts upon this subject, but so far as counsel have been able to examine them, they are in entire accord and harmony with these last quoted cases and there are none not in accord with these cases.

See also:

Charlton v. *Kelly, Sheriff, &c.*, 229 U. S., 447.

Fourth.—The law of other States.

Upon this subject see the authorities collated in 12 Cyc., page 168, Note 45.

It is submitted that it has above been shown that the mere fact of insanity alone does not free a person from criminal responsibility either in the State of New York or

within Federal and other State jurisdictions, but that the insane person, to free himself from criminal responsibility, must show that in regard to the particular acts charged he did not know the nature and quality of the acts and that they were wrong.

There are many well known forms of insanity in which there are periods of remission, during which the person is entirely sane and wholly capable of committing a crime, and yet, because of the recurrence of maniacal outbreaks, the detention of such person in an asylum for the insane becomes imperative. The mere fact of the detention of a person under legal process in an asylum for the insane, while it may fairly be said to raise a rebuttable presumption that such person is insane, raises no presumption as to the nature and quality of his insanity, nor does it raise any presumption that he is incapable of knowing the nature and quality of certain given acts or that they are wrong.

This is wholly a matter of defense, as will be apparent if one considers what would occur in Court upon the Petitioner being placed upon trial for the offense charged. It is submitted that it is plain that an indictment for the offense would not be demurrable, because nothing upon the face of the indictment would show that Thaw did not know the nature and quality of the acts charged and that they were wrong, and therefore, under the law of the State of New York, the indictment would not be demurrable.

Upon the trial, the People would make out a *prima facie* case if they proved the facts alleged in the indictment accompanying the requisition, for such proof, while it might be held to show that Thaw was insane, would not show that he did not

understand the nature and quality of the acts charged and that they were wrong.

It is plain, under the provisions of New York law, above quoted, that the Court would have to charge the jury that the Petitioner was presumed to know the nature and quality of his acts and that they were wrong in the absence of any proof to the contrary, and that the burden was upon the Petitioner to adduce such evidence.

What counsel for the Petitioner asks, is substantially to try upon the face of the papers the question of the guilt or innocence of the Petitioner; the defense being such insanity as under the law of the State of New York would excuse the commission of crime. It certainly is elementary and entirely settled by authority, that upon extradition proceedings either before a Governor or before a Court on *habeas corpus*, the question of guilt or innocence of the person sought to be extradited will not be inquired into, and the Court will not try such question.

See cases cited in note at page 939, Vol. 21, L. R. A., new series.

Also 2 Moore on Extradition, Sec. 610.

In the Court below the Petitioner's counsel cited a number of cases which they claimed showed that an insane person could not commit a crime, and they argued from these that the indictment in the case at bar did not charge a crime because it showed on its face that the Petitioner was confined in an insane asylum, and so presumptively was insane at the time of his escape.

These cases must be considered with reference both to the law of the particular State in which the decisions were rendered and the facts of the particular cases.

When so read they do not in any way touch the case at bar. The cases are of two classes:

> *First.* Those which are only illustrations of the rule in regard to the presumption of continuance which no one denies; and
>
> *Second.* Those which, when read in connection with the facts of the particular case, enunciate the rule that *when such insanity, as under the law of the particular State excuses the commission of acts otherwise a crime*, is shown to exist, then the presumption is that such insanity continues and the presumption of responsibility ceases.

None of these cases holds that an insane man, regardless of the form of his insanity, is not criminally liable for his acts; nor that there is any presumption that insanity generally, while presumed to continue, is presumed to be of the type which relieves from criminal responsibility.

In the case at bar there is no evidence even by way of presumption that the Petitioner was afflicted with a form of insanity which excused for the acts charged in the indictment. Nothing is alleged which in the remotest degree tended to show that he did not know the nature and quality of his acts and that they were wrong when he conspired to escape.

To the question before the Court the Petitioner's sanity or insanity is purely irrelevant. Since the insane are not free from criminal responsibility except where the insanity is of a particular form, the only way the Petitioner's sanity or insanity could be relevant would be if the form of it was disclosed. The question would then be as to whether or not it was of such a form as excused from criminal liability under the laws of the State of New York.

POINT V.

In interstate rendition neither the executive authority nor courts of the asylum State nor the Federal courts upon habeas corpus have power or right to inquire into the motive or purpose of the demanding State.

In the rescript of this Court dated December 7th, 1913 (Record, pp. 171, 172), occur the following passages:

> "The petitions for the writs, and the answer, or replication, of the petitioner raise certain questions, and among them:
>
> "*First*, that, while upon the papers extradition is sought for the crime of conspiracy to escape, the real and substantial purpose is to procure extradition for 'reconfinement' in the Matteawan Hospital, and thus that there is bad faith in the extradition sense."
>
> * * * * * *
>
> "It is only necessary to state these questions to show that their proper solution will require considerable time here and elsewhere."

And again, in the opinion of the Court below (Record, p. 223), it is said:

> "I think the reasonable interpretation of the entire proceeding, including the statement of counsel (Record, page 154), 'we expect to take this man back; we expect to try him and punish him for his crime, and when he has taken his punishment for his crime, we expect to put him where he belongs and where he will not be a menace to the public,' is at least that the sole purpose is not to punish for the supposed crime of conspiracy to escape from guardianship custody."

But for the passages quoted above, it would

never have occurred to counsel, that any Court could have seriously considered, that, in such a case as the one at bar, such a question as the one suggested could be considered.

The right to interstate rendition is entirely created by the Constitution and Revised Statutes of the United States.

When a demanding State has complied with the provisions of the Constitution and the Revised Statutes of the United States it is obligatory upon the asylum State to surrender the fugitive. The executive of the asylum State may exercise no discretion.

In *Commonwealth of Kentucky* v. *Dennison, Governor, etc.* (1860), 24 How., U. S., 66, the Supreme Court of the United States, by Taney, C. J., says:

> "Looking, therefore, to the words of the Constitution—to the obvious policy and necessity of this provision to preserve harmony between the States, and order and law within their respective borders, and to its early adoption by the colonies, and then by the confederated States, whose mutual interest it was to give each other aid and support whenever it was needed—the conclusion is irresistible, that this compact ingrafted in the Constitution included, and was intended to include, every offense made punishable by the law of the State in which it was committed, and that it gives the right to the executive authority of the State to demand the fugitive from the executive authority of the State in which he is found; that the right given to 'demand' implies that it is an absolute right; and it follows that there must be a correlative obligation to deliver, without any reference to the character of the crime charged, or to the policy or laws of the State to which the fugitive has

fled. * * * It will be observed, that the judicial acts which are necessary to authorize the demand are plainly specified in the act of Congress; and the certificate of the executive authority is made conclusive as to their verity when presented to the executive of the State where the fugitive is found. He has no right to look behind them, or to question them, or to look into the character of the crime specified in this judicial proceeding. The duty which he is to perform is, as we have already said, merely ministerial—that is, to cause the party to be arrested, and delivered to the agent or authority of the State where the crime was committed. It is said in the argument, that the executive officer upon whom this demand is made must have a discretionary executive power, because he must inquire and decide who is the person demanded. But this certainly is not a discretionary duty upon which he is to exercise any judgment, but is a mere ministerial duty—that is, to do the act required to be done by him, and such as every Marshal and Sheriff must perform when process, either criminal or civil, is placed in his hands to be served on the person named in it. And it never has been supposed that this duty involved any discretionary power, or made him anything more than a mere ministerial officer; and such is the position and character of the executive of the State under this law, when the demand is made upon him and the requisite evidence produced. The Governor has only to issue his warrant to an agent or officer to arrest the party named in the demand."

In *Munsey* v. *Clough* (1904), 196 U. S., page 372, the Supreme Court of the United States says:

"The proceedings in matters of this kind before the Governor are summary in their nature. The questions before the Governor, un-

> der the section of the revised statutes, above cited, are whether the person demanded has been substantially charged with a crime, and whether he is a fugitive from justice. The first is a question of law and the latter is a question of fact, which the Governor, upon whom the demand is made, must decide upon such evidence as is satisfactory to him."

Referring to the provisions of the Constitution of the United States in regard to the surrender of fugitives from justice, Chief Justice Green in the *Matter of Fetter*, 3 Zabr., 311, says:

> "It makes obligatory upon every member of the confederacy the performance of an act which previously was a doubtful obligation."

Referring to the same constitutional provision in *Dow's Case*, 18 Pa. St., 37, Chief Justice Gibson said:

> "The Federal Constitution takes away this discretion (in respect to rendition) in the case of an executive demand and makes that a matter of duty which else had been a matter of grace."

In a case of a fugitive from justice, the Court of Appeals of South Carolina said, in *State* v. *Anderson*, 1 Hill, 327:

> "A question arising under the Constitution is not a question of comity between foreign states, but of positive paramount law between co-states, which all executive, judicial and ministerial officers must observe and enforce."

In the *Matter of Voorhees*, 32 N. J. L. (3 Broom), 145, Chief Justice Beasley, said:

> "The purpose, then, of this provision of the Constitution was, as I can see, two-fold; first, to impose an obligation on each state

to surrender criminals fleeing from the justice of another state; and, second, to define clearly the class of criminals to be surrendered. * * * I think this end has been attained. For, in the first place, the language of the clause is so plainly imperative in its character as to leave no room for contention that the obligation now imposed on the respective states to surrender criminals, is, in the least degree, a matter of discretion. In the place of spontaneous submission to the law of comity, there is now substituted that implicit obedience which is due to a rule of law * * * and hitherto the nation has entrusted this important office, so essential to the harmony of the states and the complete administration of law, in the hands of several local executives, and although these officers, as has just been observed, cannot be coerced but take upon themselves the burden of such duty, yet, nevertheless, it is with satisfaction that I remark that it has been for the most part, discharged by them in entire good faith, and with perfect loyalty to the Constitution requisition. The few exceptions which are recollected have, in general, arisen from a mistaken sense as to the true nature of the duty itself; for an idea has undoubtedly prevailed to a considerable extent, that such duty in some respects was one resting in discretion. But this is altogether an error. If the demand be made in due form, and the requisite documents exhibited showing that the fugitive is charged with crime, the duty to surrender becomes merely a ministerial one. Under such circumstances, to refuse to authorize the extradition is a clear infraction of the rule prescribed in the constitutional clause above quoted. I think it, therefore, indisputable, that the Constitution has made the surrender of a fugitive from justice, which by the law of nations demand upon the concessions of

comity, a rule of law of perfect obligation and entirely imperative in its character."

In *People ex rel.* v. *Pinkerton*, 17 Hun, 199, the Supreme Court of the State of New York, said:

"The duty of the Governor of this State to issue the rendition warrant was imperative. Having performed the quasi judicial function of determining that the act of Congress had been complied with by the Governor of Massachusetts, the remaining part of his duty was ministerial only."

In the last revision of his Commentaries, published in 1848, 2 Comm., 32, Note H, 12th Ed., Chancellor Kent said:

"I am not aware that there has been any judicial decision on this provision; and, as it stands, I should apprehend that, on the demand being made and the documents exhibited, no discretion remained with the executive of the State to which the fugitive had fled, and that it was his duty to cause the fugitive to be arrested and surrendered."

In his treatise on Extradition and Interstate Rendition, Edition of 1891, Volume 2, Section 617, John Bassett Moore states the objections to the theory of discretion in extradition as follows:

"The theory that, a legal demand having been made, the executive authority to whom it is presented, may inquire into the circumstances of the case, and, in accordance with his notions of policy, of expediency, of propriety, or of the merits of the demand, refuse to grant it, is open to the following objections:

"1. It is inconsistent with the mandatory provisions of the Constitution, that a person charged in any State with treason, felony, or

other crime, who shall flee from justice and be found in another State, 'shall, on demand of the executive authority of the State from which he fled, be delivered up.'

"2. It is inconsistent with the positive terms of the Act of 1893, which was 'a temporary construction of the constitutional provision.'

"3. It involves the exercise by the executive of one State of the supervision of all criminal procedure of other States.

"4. It violates that clause of the Constitution which requires that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State.

"5. By rendering nugatory the specific provisions that fugitives from justice shall be given up, it destroys one of the methods by which the framers of the Constitution sought to 'establish justice'—one of the declared general purposes of that instrument.

"6. It admits the consideration of the question of criminality, in violation of the Constitution and the Act of Congress, which only require that the fugitive shall be duly charged with crime.

"7. It enfeebles the administration of justice by rendering it uncertain, in that it substitutes for a rule of law the will or caprice of an individual.

"8. It permits the authorities of the demanding State to be put on trial on the charge of bad faith.

"9. In opening the way to impeachments, to motives and the attribution of dishonest purposes, it gives rise to recriminations, creates resentments and fosters ill-will, and thus pre-

vents the realization of that 'more perfect union' which the Constitution was designed to secure.

"10. For the reason that it substitutes will for law, admits an inquiry into motives, and puts the demanding authorities on trial, it renders the relation of the States in respect to the delivery of offenders less intimate and desirable than those of independent and foreign nations bound by treaty."

Section 5278 of the Revised Statutes of the United States, provides:

"Whenever the executive authority of any State or territory demands any person as a fugitive from justice of the executive authority of the State or territory to which such person has fled, and produce an indictment found or an affidavit made before a magistrate of any State or territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the Governor or Chief Magistrate of the State or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear * * * ."

Wharton, in his Criminal Practice and Pleading 9th Edition, says:

"It is, indeed, a prerequisite to his (the Governor's) action that it should be proved to his satisfaction that the person against whom he is asked to show a warrant is the same as the one charged in the requisition, that such

person is a fugitive from the demanding State, and that the affidavit was authenticated by the demanding Governor. But beyond this he cannot go. If the requisition is duly backed by indictment or affidavit, a certified copy of which is attached, he has no right to inquire whether the person demanded was guilty of the offsense charged, or whether the object of the requisition was other than it apparently seemed. The only cases in which the requisition, if regularly and duly backed, can be assailed, are those in which judgments of sister States, under analogous provision of the Constitution, can be assailed. It may be shown that the requisition fails from want of jurisdiction, or was fraudulently obtained, and may have been void, or was of a character such as stripped it of conclusiveness. But when once its genuineness and its technical conformity to law are ascertained, its averments cannot be disputed. A requisition can no more be impeached on the ground that improper collateral motives co-operate in obtaining it, than can a judgment of a sister State be impeached on the same grounds, supposing there was no fraudulent imposition on or by the executive issuing it. If there was jurisdiction, if the Governor in one case and the judgment Court in the other were not fraudulently imposed upon, then the averments of the record in either case cannot be assailed in the State in which the execution is set."

Apart from any authority, a mere reading of this section (Section 5278, U. S. Rev. Stat.) would make it plain that the duty of the Governor of the asylum State was one which did not involve the exercise of any discretion. Having determined the identity of the person charged, that he is a fugitive, and that a crime is charged, the duty to surrender then becomes imperative, and any questions of the guilt or in-

nocence of the person charged, or of the motives lying back of the prosecution, or of the policy of the laws of the demanding State, are not questions which the Governer is authorized to consider.

In 21st Lawyers' Reports Annotated, New Series, at page 939, is found a very learned and elaborate note in which practically all the authorities up to that date (1909) upon the subject of what the Courts may consider upon a writ of habeas corpus in extradition proceedings, are cited. And it would seem, both in reason and upon authority, that a Governor of an asylum State, could consider no more upon a hearing of this character, than a Federal Court or a Court of his own State could consider upon a writ of habeas corpus. This note collates a body of authorities tending to show that a Governor or a Court has no discretion in interstate rendition when the provisions of the Constitution and the Revised Statutes of the United States are complied with.

If, then, the executive of an asylum State has no right to inquire into the motive or purpose of the demanding State, upon what theory of law, or upon what authorities, has a Federal Court a right to go behind the decision of the Governor of the asylum State after he has honored a requisition and granted a surrender of the fugitive?

The following passage from the opinion of Governor Felker of New Hampshire upon ordering the surrender of the Petitioner is respectfully submitted for the consideration of this Court (Record, p. 129):

"With profound respect therefor, I am

unable to view my duty in the premises, as including an investigation of Mr. Thaw's mental condition, or of the conduct of the counsel for the State of New York, or of the probable guilt or innocence of the accused. To do so would hardly be consistent with the mandatory provision of the Constitution that a person charged in any State with treason, felony or other crime, who shall be found in another State, '*shall, on demand of the executive authority of the State from which he fled, be delivered up.*' It would, furthermore, involve an attempted supervision, by myself, over procedure of Courts of criminal jurisdiction of another State, in a manner entirely beyond the power of such State to control. Such a course would, likewise, involve an inquiry into the motives of the authorities of the demanding State in making the request. Any one of these would manifestly lead to the virtual suspension and eventual nullification of the provisions of the Federal Constitution, by States otherwise supposed to be subject thereto. I have, and I shall continue to assume that the course of the State of New York, in its present demand, does, and its subsequent conduct with reference to the arraignment and trial of the respondent upon the indictment for which alone the extradition sought is hereby granted, will demonstrate her full appreciation of the dictates of fair play and a righteous and equal administration of justice."

Article IV, Section 1 of the Constitution of the United States provides:

> "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other State." * * *

When the State of New Hampshire has given "full faith and credit" to the public act of the

State of New York in seeking the surrender of the Petitioner as a fugitive from justice, where within the limits of the Constitution of the United States, the statutes enacted by the Federal Government under that Constitution, or the decisions of Federal Courts, does the United States, through its District Court in the District of New Hampshire, derive authority to inquire into the motive or purpose of the State of New York or its good or bad faith?

The custody of the body of Harry K. Thaw is of no importance *per se* to the State of New York. It would be only too glad to be freed from the recurring scandals in which his control of wealth involves the administration of the law. It cares nothing that Thaw should be out of Matteawan and without its territorial limits. It cares much for its own dignity and that the orderly administration of its laws should not be perverted or obstructed by criminal means or the corrupt use of money. It does not believe that any legal efforts or any expenditures of money are unwarranted to maintain its dignity and the proper administration of its laws. It is submitted that such efforts and expenditures can only be construed as evidence of bad faith by the unthinking and those who are either ignorant of the facts or who have an interested motive in misconstruing them.

There is nothing in the record herein to properly raise the question of good or bad faith on the part of the State of New York.

At the hearing below no evidence upon this point was taken. Remarks of counsel printed in the record show that counsel for the State of New York considered the Petitioner a criminal lunatic, dangerous to be at large, and evinced a determina-

tion on the part of the State of New York not to allow such a man to set at naught its criminal law by corrupt means and to punish him criminally for the crime he had committed.

Referring to the passage from the opinion of the Court below quoted at the commencement of this "Point V" it is submitted that an intent on the part of the State of New York not to release a dangerous and criminal lunatic, after he was punished for his crime in the due course of the criminal law, can with no propriety be construed as showing bad faith in its demand upon the State of New Hampshire for the return of the person charged with crime.

POINT VI.

The indictment accompanying the demand upon the State of New Hampshire for the surrender of the Petitioner herein constitutes a charge of crime within the meaning of the Constitution and Revised Statutes of the United States and in form is in accordance with the rules of technical pleading.

It was contended below that the indictment accompanying the demand of the Governor of the State of New York upon the Governor of the State of New Hampshire, did not within the meaning of the Constitution of the United States and the Revised Statutes of the United States constitute a charge of crime because it was defective, tested by the established rules of pleading. The Court below in its opinion (Record, pp. 224, 225), dwelt somewhat upon this matter but an examination of its views shows that the learned Judge had become confused in his conception of the law upon this subject, especially in its application to interstate rendition.

This Court in

> *Pierce* v. *Creecy* (1907), 210 U. S., 387, at page 402,

said:

> "The only safe rule is to abandon entirely the standard to which the indictment must conform, judged as a criminal pleading, and consider only whether it shows satisfactorily that the fugitive has been in fact, however inartificially, charged with crime in the State from which he has fled." (citing authorities).

And again at pages 404, 405, of the same case:

> "This court, in the cases already cited, has said, somewhat vaguely but with as much precision as the subject admits, that the indictment, in order to constitute a sufficient charge of crime to warrant interstate extradition, need show no more than that the accused was substantially charged with crime. This indictment meets and surpasses that standard, and is enough. If more were required it would impose upon Courts, in the trial of writs of habeas corpus, the duty of a critical examination of the laws of States with whose jurisprudence and criminal procedure they can have only a general acquaintance. Such a duty would be an intolerable burden, certain to lead to errors in decision, irritable to the just pride of the States and fruitful of miscarriages of justice."

In every State, including New York, wherever the law in regard to conspiracy requires that, in addition to the meeting of the minds of the conspirators upon the same proposition, some overt act pursuant to the agreement must be performed, the character of the overt act whether criminal, unlawful or innocent is entirely immaterial upon the question whether such act is or is not such an overt act as is required by law to be alleged and proved.

In the case at bar it may be conceded that the overt acts alleged are not criminal or even unlawful without touching the question under discussion. The appellant does not base his claim that the indictment charges a crime upon the character of the overt acts alleged.

It is not claimed that the indictment charges a crime because the conspirators designed to use

means in themselves and taken alone criminal or even unlawful.

It is conceded that the indictment does not allege "a confederacy to commit a lawful act by unlawful means."

The following quotation from *Pettibone* v. *U. S.* (1892), 148 U. S., 197 at page 203, makes very clear what we contend for.

> "A conspiracy is sufficiently described as a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means, and the rule is accepted, as laid down by Chief Justice Shaw in *Commonwealth* v. *Hunt*, 4 Met., 111, that when the criminality of a conspiracy consists in an unlawful agreement of two or more persons to compass or promote some criminal or illegal purpose, that purpose must be fully and clearly stated in the indictment; while if the criminality of the offence consists in the agreement to accomplish a purpose not in itself criminal or unlawful, by criminal or unlawful means, the means must be set out."

We contend that, in the case at bar, the criminality consists "in a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose" and that "that purpose must be fully and clearly stated in the indictment," and is so stated, and that "if the criminality of the offence consists in the agreement to accomplish a purpose not in itself criminal or unlawful, by criminal or unlawful means, the means must be set out," but that in the case at bar the "criminality of the offense" does not consist "in the agreement to accomplish a purpose not in it-

self criminal or unlawful, by criminal or unlawful means."

It is too plain to require discussion that it is a sound legal proposition that an agreement to do an unlawful act or an agreement to do a lawful act by unlawful means constitutes a criminal conspiracy at the common law.

The Legislature of the State of New York did not see fit to make *every act* which was "a perversion or obstruction of justice, or of the due administration of the laws" a crime, but it did by statute make *any conspiracy* to "commit any act," whether the act itself was a crime or not, "for the perversion or obstruction of justice, or of the due administration of the law" a crime.

As was said in *Pettibone* v. *U. S.* (*supra*):

> "A conspiracy is sufficiently described as a combination of two or more persons, by concerted action, to accomplish a criminal or *unlawful purpose* * * *."

The New York statute makes the combining to do any act "for the perversion or obstruction of justice, or the due administration of the law" a crime. To combine to do any act, whether in itself lawful or unlawful, for such a "purpose" is a crime, *i. e.*, is a combination to accomplish an "unlawful purpose," a purpose declared unlawful by the statute itself.

The real question, therefore, before the Court is not whether the act which it was conspired to do was in itself taken alone criminal or even unlawful, but, irrespective of its criminal or unlawful character was it an act "for the perversion or obstruction of justice, or of the due administration of the law."

If the act which it was conspired to do was such an act then, to conspire to do it is a crime under the New York statute regardless of the character of the act by itself or of the means employed for its accomplishment.

The criminality lying in the agreeing to do the act, and not in the means designed to be employed in doing the act, the indictment is not faulty, for it clearly sets forth the purpose or the act to be done and its allegations of means to be employed is entirely sufficient within all the authorities.

No one would contend that an indictment for conspiracy to murder John Doe, if the purpose was clearly described, would be defective because the pleader was unable to allege the means that the conspirators designed to employ. If it were, then they could escape if they simply agreed to use any means which might be appropriate without coming to any understanding upon any particular means.

Inasmuch as the authorities cited below by Petitioner's counsel, though all sound law, do not apply, if the foregoing discussion is sound, they are not considered in detail.

An examination of these authorities will show that they fall into two classes:

1st. Conspiracies to commit a crime or an act unlawful at the common law; or

2nd. Conspiracies in which the criminality depended not on the purpose, but the means to be employed.

In the first of these classes it was, of course, necessary to allege facts showing that the act conspired to be done was a crime or unlawful by it-

self. In the second of these classes a full description of the means to be employed was of course essential. Not one of these cases deals with such a case as the one at bar, where the statute makes an agreement as to a particular class of acts, irrespective of their criminal or unlawful character by themselves, the crime of conspiracy.

We in reality have only to consider whether the act planned by the conspirators, viz., the escape of the Petitioner herein from the asylum, and fully described in the indictment was an act

> "for the perversion or obstruction of justice, or of the due administration of the laws."

CONCLUSION.

It is respectfully submitted that the decree made by the District Court of the United States for the District of New Hampshire and from which this appeal was taken should be reversed.

JAMES A PARSONS,
WM. TRAVERS JEROME,
FRANKLIN KENNEDY,
Of Counsel for the Appellant,
Holman A. Drew, Sheriff, etc.

APPENDIX.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* A. RUSSELL PEABODY, Relator, *v.* ROBERT W. CHANLER, Sheriff of Dutchess County, and ROBERT B. LAMB, Superintendent of the Matteawan State Hospital, Respondents.

HARRY K. THAW and CHARLES MORSCHAUSER, Attorney for the Relator, Appellants.

Second Department, June 4, 1909.

133 App. Div. (N. Y.), 159; affirmed 196 N. Y., 525.

Crime—insanity—commitment under Section 454 of the Code of Criminal Procedure—constitutionality—police power.

Section 454 of the Code of Criminal Procedure, which provides that "when the defense is insanity of the defendant the jury must be instructed if they acquit him on that ground, to state the fact with their verdict. The Court must, thereupon, if the defendant be in custody, and they deem his discharge dangerous to the public peace and safety, order him to be committed to the State lunatic asylum until he becomes sane," is not unconstitutional on the ground that it does not provide for notice and a hearing.

It was the intention of the Legislature that the Court should rest its conclusion as to the defendant's insanity at the time of the trial on the evidence given at the trial and the defendant's appearance thereat.

By a plea of insanity a defendant in a criminal action voluntarily submits the question of his insanity to the Court by which he is tried, and al-

though the direct issue is insanity at the time of the commission of the alleged crime, yet evidence of such insanity may show that it is chronic and continuous or progressive and incurable.

One who makes such a plea and seeks to establish it has notice under the provisions of Section 454 of the Code of Criminal Procedure of a hearing that may reveal his condition of insanity at the time of the trial and lead to his commitment.

The trial of a defendant does not intend that he is sane because an insane person may be tried for a crime if he is competent to understand the proceeding and make his defense.

A commitment made under Section 454 of the Code of Criminal Procedure is not for the punishment of the defendant, but for the protection of the public and is made in the exercise of the police power of the State which permits the restraining of dangerous insane persons.

The provisions of law whereby a defendant committed under Section 454 of the Code of Criminal Procedure, can forthwith institute habeas corpus proceedings to establish his sanity and consequent right to an instant discharge, satisfy the constitutional requirement that one shall not be deprived of liberty without due process of law.

Gaynor, J., dissented, with opinion.

Appeal by Harry K. Thaw and Charles Morschauser, attorney for the relator, from an order of the Supreme Court, made at the Westchester Special Term and entered in the office of the Clerk of the County of Westchester on the 12th day of October, 1908, dismissing a writ of habeas corpus theretofore issued upon the petition of the relator

in behalf of Harry K. Thaw, and directing that the said Thaw be remanded to the custody of the Matteawan State Hospital for Criminal Insane.

Franklin Bartlett, for the relator.

Asa Bird Gardiner and *Robert C. Taylor* (*Edward R. O'Malley, Attorney General*, and *William Travers Jerome, District Attorney*, with them on the brief), for the respondents.

JENKS, J.:

The point raised is that the statute whereby Thaw was committed is unconstitutional in that it does not provide for notice and a hearing. Thaw was committed pursuant to a provision contained in that part of the Code of Criminal Procedure which relates to the trial and the verdict (Part 4, Tit. 7, Chap. 3). This provision (Section 454) reads: "When the defense is insanity of the defendant the jury must be instructed, if they acquit him on that ground, to state the fact with their verdict. The Court must, thereupon, if the defendant be in custody, and they deem his discharge dangerous to the public peace or safety, order him to be committed to the State lunatic asylum until he becomes sane." "The practical effect" is that the Legislature has prescribed that a successful defense of insanity shall not as a matter of course be followed by the absolute discharge of the defendant (*Gleason* v. *Inhabitants of West Boylston*, 136 Mass., 489, 490), but it may be followed by his commitment until he becomes sane. As such commitment is not a matter of course, but may be made only by that Court, and only of a defendant in detention whom the Court deems dangerous to the public peace and safety if discharged, and the com-

mitment lasts only until the defendant becomes sane, we must infer that the Legislature intended that the Court would commit only after its conclusion that at the time of acquittal the defendant was insane so as to be a menace to the public peace and safety. But as there is no provision for enlightenment of the Court in any other manner, it must be that the Legislature intended that the Court could rest its conclusion upon the evidence given at the trial and the appearance of the defendant thereat. If the defendant's plea was insanity and it had prevailed, it would follow that insanity was litigated at the trial. Although the inquiry at the trial would be directed to insanity at the time of the commission of the offense, yet the evidence might establish that such insanity had not ceased, but had continued, that it was chronic, that the defendant might then or thereafter, in the very nature of his disease, be subject to recurrences of a state of mind like unto that in him when he committed the alleged crime. And moreover, such evidence might well bear directly upon the condition of the defendant at the time of trial. For Gray, J., speaking for the Court in *People* v. *Hoch* (150 N. Y., 291), says: "Of course, the issue turns upon the prisoner's mental condition at the time of the homicide—whether he was laboring under such a defect of reason as to render him incapable of knowing the nature and quality of the homicidal act, or was incapable of knowing that it was wrong. But there is no apparent reason, and I am aware of no authority, for holding that, in addition to all the other facts, the jury may not be informed, by one competent to speak, as to the mental condition of the defendant at the time of his trial. He stands before them accused of the crime, with the plea of

insanity to shelter him from a conviction at their hands, and, in their consideration of his plea for exoneration, no competent evidence bearing upon his mental condition at the time of the homicide, or since, should be excluded and the evidence objected to, certainly, cannot be said to be prejudicial to any substantial rights of the accused, or to contravene the demands of justice." Thus the Legislature might well have contemplated that the Court might reach its conclusion, enlightened as the Court was said to be in *People* v. *McElraine* (125 N. Y., 608): "It had previously tried the defendant for the same crime and had heard the evidence adduced by the defendant to support the plea of insanity. It was familiar with the appearance and conduct of the prisoner during the period of that trial, and had sufficient grounds before it to judge as to the probability of his present sanity." It is common knowledge that insanity may be chronic, yet with lucid intervals, that it is marked by periods of quiet and of storm, that one insane may at times demean himself as if entirely normal, and yet without warning suddenly become as dangerous as a Malay running amuck. There is no method in actual madness. The plea of insanity is that of a defendant, and he must be regarded as understanding the effect thereof (Penal Code, Section 20). He, therefore, voluntarily submits the question of his insanity to the Court of his trial. Although the direct issue is insanity at the time of the commission of the alleged crime, yet evidence of such insanity may also show that it is chronic and continuous or progressive and incurable, or evidence may be given "as to the mental condition of the defendant at the time of his trial" (*People* v. *Hoch*, *supra*). It cannot then be said

that a defendant who makes the plea of insanity and seeks to establish it did not have notice under this provision of a hearing that might reveal his condition of insanity at the time of his trial, and a hearing of which the result might be such commitment upon acquittal for insanity, under the said provision of the Code of Criminal Procedure, as was made in this case. It cannot be said that the trial of a defendant intends that he is sane for the reason that an insane man may be tried if he is competent to understand the proceeding and to make his defense (Penal Code, Section 20; *Freeman* v. *People*, 4 Den., 9). The law makes a distinction between the mental irresponsibility which precludes trial for a crime and that which excuses from liability for a crime. An act done by a person who is an idiot, imbecile, lunatic or insane is not a crime, but one is not excused from criminal liability as an idiot, imbecile, lunatic or insane person or of unsound mind, except at the time of the commission of the alleged criminal act he was laboring under such defect of reason as either not to know the nature and quality of the act he was doing or not to know that the act was wrong. But the prohibition against trial, sentence to punishment or punishment is that one cannot be tried or sentenced or punished while in a state of idiocy, imbecility, lunacy or insanity so as to be incapable of understanding the proceeding or making his defense (Penal Code, Sections 20, 21).

Such a commitment is not for the punishment of such a defendant, for there can be no punishment for him who has been acquitted, but it is for protection for the public, made in the exercise of the police power of the State, which permits the restraint of an insane person who at large would be

a danger to the peace and safety of the people. The commitment can last only so long as the defendant is insane, and he has the right at any time under the law to have his sanity determined upon habeas corpus.

Moreover, Freund on the Police Power (Section 255) says: "The right to apply at any time for discharge has been held to reconcile even the absence of hearing in the first instance with the constitutional requirement of due process, and if upon such proceeding the petitioner is found to be insane his detention may be continued." In *Dowdell, Petitioner* (169 Mass., 387), the petitioner applied for his discharge from commitment in that the statute was unconstitutional because it did not require any notice to the insane person before the commitment was signed, and so violated the provisions of the Declaration of Rights that no subject shall be deprived of his liberty but by the judgment of his peers and the law of the land, and the provisions of the fourteenth amendment of the Constitution of the United States that no State shall deprive any person of liberty without due process of law. And the Court said: "The order of commitment settles nothing finally or conclusively against the person committed. It does not take from him the care or control of his property. It is not equivalent to the appointment of a guardian over him. *Leggate* v. *Clark*, 111 Mass., 308, 310. He is entitled as a matter of right to institute judicial proceedings under the statutes, to determine the necessity and propriety of his confinement. He is not denied the same protection of the laws which is enjoyed by all other persons in the Commonwealth under like circumstances. He is not, therefore, deprived of liberty without due process

of law, according to the judicial construction which has been put upon those words. *Marchant* v. *Pennsylvania Railroad*, 153 U. S., 380. *Hallinger* v. *Davis*, 146 U. S., 314, 321. *Caldwell* v. *Texas*, 137 U. S., 692. *Dent* v. *West Virginia*, 129 U. S., 114. *Missouri* v. *Lewis*, 101 U. S., 22. * * * And the right to institute judicial proceedings undre the statutes is a sufficient protection of the liberty of the subject to meet constitutional requirements. *Wares, Petitioner*, 161 Mass., 70, 74. *Miller* v. *Horton*, 152 Mass., 540, 543. *Farnham* v. *Pierce*, 141 Mass., 203. *Jones* v. *Robbins*, 8 Gray, 329, 341. *Charannes* v. *Priestley*, 80 Iowa, 316. *Doyle, Petitioner*, 16 R. I., 537." In *Le Donne, Petitioner* (173 Mass., 550), Le Donne was found guilty of manslaughter and sentenced to the State prison. Before expiry of his term he was adjuded insane and removed to the asylum on a warrant. The contention was that the statute whereunder he was removed to the asylum was unconstitutional. The Court, per Morton, J., said: "We discover nothing unconstitutional in the statute under which the petitioner was removed to the asylum and is detained there. It is not unconstitutional because it authorizes the commitment and detention of an insane person without any previous hearing, or without an order from any judge. The petitioner 'is entitled as a matter of right to institute judicial proceedings under the statutes, to determine the necessity and propriety of his confinement.' The order of confinement settles nothing finally or conclusively against him. 'And the right to institute judicial proceedings under the statutes is a sufficient protection' of his liberty 'to meet constitutional requirements.' *Dowdell, Petitioner*, 169 Mass., 387." I think that this provision should be

upheld. (See, too, *Ex parte Brown*, 1 L. R. A. [N. S.], 540; *People ex rel. Mooney* v. *Walsh*, 21 Abb. N. C., 299; and further, *Regina* v. *Oxford*, 9 C. & P., 525; *Queen* v. *Martin*, 1 James [N. Sc.], 322.)

In fine, I think that the Legislature contemplated that upon the trial for a crime the investigation into the insanity of the defendant at the time of the commission of a crime, pleaded by the defendant, might satisfy the Court that if the defendant were entitled to be freed absolutely upon an acquittal based upon such insanity, the verdict would not only exonerate the defendant, but in effect might let loose one then so insane as to be a menace to public peace and safety, and that, therefore, the Legislature expressly limited the effect of such an acquittal in the exercise of the police power, so that it might not be an absolute discharge in course, but that the Court might order the detention of the defendant as a dangerous insane person, until his reason was restored.

And I think that such a defendant, by this provision of the Code of Criminal Procedure, had notice and a hearing that contemplated the process whereby he might thus be committed, and that in any event the provisions of express law whereby he could forthwith institute proceedings to establish his sanity and his consequent right to instant discharge, satisfy the safeguards invoked against this provision of the law.

The order should be affirmed.

Hirschberg, P. J., and Miller, J., concurred; Gaynor, J., read for reversal of the order and for discharge of the relator, unless within five days he be committed under the Insanity Law.

RICH, J.:

In June, 1906, Harry K. Thaw was indicted for the crime of murder in the first degree and was tried in the following January.

During the progress of the trial the learned Court appointed a commission upon the application of the District Attorney to ascertain and report the then mental condition of the prisoner under the provisions of Section 658 of the Code of Criminal Procedure, the question submitted being whether "Harry K. Thaw is in a state of idiocy, imbecility, lunacy or insanity, as to be incapable of rightly understanding his own condition, the nature of the charges against him and of conducting his defense in a rational manner." The commissioners answered this question in the negative. The trial thereupon proceeded and the jury disagreed. On January 6, 1908, the prisoner was again placed on trial and through his counsel amended his former plea of "Not guilty" to "Not guilty on the ground of insanity at the time of the commission of the offense charged in the indictment," upon which ground the jury rendered a verdict of not guilty. Upon the rendition of judgment thereon the learned Trial Justice said: "The jury having found a verdict by which the prisoner is found to have been insane at the time of the commission of the acts charged in this indictment, an obligation now devolves upon the Court to discharge his duty under the law. The testimony in this case, so far as the jury have found testimony of insanity or could have found testimony of insanity, is testimony of manic-depressive insanity as testified to by the experts as well as by Dr. Wells. That testimony has been based upon prior outbreaks upon the part of the defendant as testified to by the

nurse in Monte Carlo, by Dr. Wells, by Dr. Bailey, by Dr. Burton-Browne and the other witnesses in the case. It appears from the testimony that the recurrence of these attacks is reasonably if not absolutely certain; that the period of recurrence is incapable of being estimated or even guessed at by human experience, judgment or foresight. And nobody has testified in this case that there is any possibility of cure from the condition of manic-depressive insanity. It furthermore appears that in the maniacal form of manic-depressive insanity in its aggravated forms there is danger of assaults or murders being committed by the person who is troubled or afflicted by this ailment. In the depressive state of this form of the malady it appears from the testimony that there is danger that a person so afflicted will commit suicide. Upon this testimony in this case apart from any other considerations that might recommend themselves to the Court, the Court is satisfied that the enlargement of the defendant would be dangerous to the public safety, and the impressions of the Court are very strong as to the duty devolving upon its conscience to see to it that the defendant is not now discharged. The Court, therefore, orders and determines as follows: The defendant for his trial on the indictment for murder herein having been acquitted by the jury on the ground of insanity and the Court being certified of the fact of the defendant being in custody and the Court deeming his discharge at this time dangerous to the public safety, it is ordered that the said Harry K. Thaw be detained in safe custody and be sent to the Matteawan State Hospital, there to be kept in said hospital until thence discharged by due course of law."

A formal order was accordingly entered and the prisoner delivered to the superintendent of said hospital. This procedure was taken under the provisions of Section 454 of the Code of Criminal Procedure.

On April 25, 1908, a writ of habeas corpus issued, and Thaw was produced at a Special Term on May 4, 1908. The issues raised in that proceeding were whether Section 454 of the Code of Criminal Procedure was constitutional, and whether Thaw was then sane or insane. The Special Term proceeded without objection to try the sole issue of fact as to whether or not the prisoner was then sane or insane. The issues were determined adversely to him, and on June 27th a final order was entered dismissing the writ and remanding him back to the custody of the superintendent of the Matteawan State Hospital. In his findings and opinion the learned Court says: "I am satisfied from the evidence adduced before me that the mental condition of Harry K. Thaw has not changed; and I find that he is now insane and that it is so manifest as to make it unsafe for him to be at large." (*People ex rel. Peabody* v. *Baker*, 59 Misc. Rep., 359.) On June 26, 1908, another writ of habeas corpus was allowed by another Justice, returnable June 29th; upon the return day the relator in behalf of Thaw moved for a jury trial, *first*, as matter of right, and *second*, as matter of judicial discretion, both of which motions were denied. He then moved for his discharge upon several grounds involving the constitutionality of Section 454 of the Code of Criminal Procedure, and the validity of the original order of commitment, which motion was denied. Exceptions were taken to each of these rulings. The record shows that

the learned Justice at Special Term ruled that the issue of fact, of whether or not the relator was sane, was before him for trial, and announced that he would lay aside all other business and hear the evidence upon that issue at such time as counsel could agree upon. In answer to his inquiry, "Have you any evidence to offer in behalf of the prisoner or relator upon that issue?" counsel for the relator replied: "We desire to stand upon our points of law and upon the constitutional points raised," to which the Court responded: "I have already held that the burden of proof upon the issue of the present sanity or insanity rests upon the prisoner, or those who appear in his behalf; that I am bound here to take the verdict of the jury which found him insane as true, and that the commitment of Mr. Justice Dowling is well made; I have overruled the objections upon constitutional grounds which have been presented, and no evidence being offered, therefore, I have but one thing to do, that is to dismiss the proceedings and remand the prisoner to the Matteawan State Hospital." From the order accordingly entered this appeal is taken, and three questions are presented for our consideration and determination:

First. Is Section 454 of the Code of Criminal Procedure constitutional?

Second. Was the original commitment void as being an indefinite sentence amounting in reality to perpetual imprisonment? And,

Third. Did the Special Term err in denying the relator's motion for a trial by jury, either as matter of right or of discretion?

Upon the first and second questions the relator's

contention is based upon the assumption that a commitment under this section must rest upon the presumption that the insanity of the defendant, existing at the time of the commission of the crime, continued down to the time of the commitment, and that the Legislature cannot constitutionally empower the Court to act upon such a presumption; that it authorizes the commitment of a defendant, acquitted of the crime for which he has been tried, to a State lunatic asylum, and provides no way in which he can be discharged other than one dependent upon the volition of the superintendent of such asylum, and that it makes no provision for notice to the defendant, and an opportunity to be heard, upon the question of his mental condition at the time the commitment is made. These contentions are based, I think, upon erroneous assumptions of the purpose and legal effect of the section, and give no consideration to the police power of the State and the manner of its exercise, or to the evidence upon which Mr. Justice Dowling acted in committing Thaw to the State hospital. The jurisdiction of the State is inherent over a person deprived of his mental faculties; it is his duty to protect the public, as well as the unfortunate himself, from the danger incident to his disordered mental condition and insane acts, and it has the authority, under its police power, to act summarily in so doing. The discharge of this duty is accomplished, in the case of a lunatic not charged with crime, under the provisions of the Insanity Law (Laws of 1896, Chap. 545, Sec. 60 *et seq.*, as amd.) authorizing summary commitment to an insane asylum by a Judge upon the certificate of two medical examiners of existing insanity, and in criminal cases by the provisions of Section 454 of the

Code of Criminal Procedure, authorizing a Trial Justice before whom a prisoner has been tried for a crime and acquitted by the jury upon the ground of his insanity at the time the crime was committed, if he deems discharge dangerous to the public peace or safety, to summarily commit the defendant to the State lunatic asylum if he be then in custody. Both are temporary expedients, exercised for the purpose of discharging the duty the State owes the public of protection from the danger incident to permitting freedom to a person mentally deranged. The same principles of law are applicable in the one case as in the other, the same objects are accomplished and the same results obtained. If the statute under the provisions of which a lunatic is, by a civil proceeding, temporarily restrained of his liberty, with its prescribed summary procedure, is constitutional—which cannot be seriously questioned—the statute under which a person charged with crime, who is acquitted because of insanity at the time the crime was committed, may be summarily deprived of his liberty for the protection of the public while his insanity and dangerous proclivities continue, is constitutional. In other words, if the State has the authority and legal right to summarily deprive an alleged insane person, not charged with crime, of his liberty temporarily, upon evidence contained in the certificates of two medical examiners, in the discharge of its duty to protect the public from the danger liable to result from his disordered and insane acts, it is charged with the same duty and has the same authority and legal right (upon sworn testimony received upon the trial, in the presence of the lunatic and his representatives, which it is his right to controvert, if not true) to act summarily

in depriving the defendant of his liberty temporarily, for the protection of the public.

This question, in the case of an alleged lunatic not charged with crime, has been very recently considered by the Court of Appeals in *Sporza* v. *German Savings Bank* (192 N. Y., 8) in which Judge Haight and Judge Willard Bartlett wrote exhaustive opinions. Judge Haight, referring to former procedure, says: "It was common practice for the relatives and next of kin of persons who had become insane, if violent, to restrain them and place them in some retreat or institution for their care and medical treatment. The writ of habeas corpus was always available to inquire into the cause of such detention and to release such persons in case they were found sane; but if insane, their detention was sanctioned under the police power of the State on account of the necessity of protecting them and the public from their disordered minds and insane acts." He considers at length the jurisdiction possessed by the State over lunatics, and the conclusion is reached that the summary methods of their commitment are constitutional and valid. Judge Bartlett says: "In considering the question whether a finding of incompetency by a jury is a condition precedent to the appointment of a committee it is important to distinguish between proceedings having this end in view and proceedings instituted in the exercise of the police power for the temporary restraint of an insane person prior to the appointment of any committee. It is essential, of course, not only for the welfare of incompetent persons themselves but for the protection of their relatives and the community at large that authority should exist somewhere to restrain those manifesting evidence of insanity, to the end

that they may be properly treated for the purpose of effecting a cure and to protect those who may be endangered by violence at their hands. At common law any one, even though not a relative, might interfere to restrain an insane person who was dangerous to himself or others. * * * A dangerous maniac might always be restrained temporarily. * * * The provisions of our Insanity Law (Laws of 1896, Chap. 545, Art. III) relating to the commitment of alleged incompetent persons upon medical certificates and similar statutory provisions generally are designed to effect the same object under legal sanction as was accomplished at common law by the interference of private persons to restrain a lunatic in order to prevent him from doing harm to himself or others. To this end persons alleged to be insane may be committed to institutions for the custody and treatment of such patients upon an order made by a Justice of the Supreme Court or other Judge of a court of record. Such commitment is based upon an order 'adjudging such person to be insane upon a certificate of lunacy made by two qualified medical examiners in lunacy.' (Laws of 1896, Chap. 545, Sec. 60.) * * * The proceedings thus provided for by the Insanity Law are in no wise designed as a substitute for those upon an inquisition *de lunatico inquirendo*. The purposes of the Insanity Law are protective merely, although an order for a commitment thereunder is described as 'adjudging such person to be insane.' The order is not strictly speaking a judgment at all, for it does not affect the status of the person alleged to be insane. This has been held in regard to a similar statute in Massachusetts, where it was said: 'The order of commitment settles nothing finally or conclusively

against the person committed. It does not take from him the care or control of his property. It is not equivalent to the appointment of a guardian over him. He is entitled as a matter of right to institute judicial proceedings under the statutes, to determine the necessity and propriety of his confinement.' (*Matter of Dowdell*, 169 Mass., 387.) Notwithstanding a commitment under the Insanity Law, a person thus committed remains liable to service of civil process (Code Civ. Pro., Sec. 427), and until a committee has lawfully been appointed for him, his legal right to control his property remains unaffected. The so-called adjudication made upon the certificate of the medical examiners in lunacy merely affords judicial warrant for the detention and treatment of the alleged incompetent in a State hospital or other institution licensed by the State for the care and treatment of the insane."

That the commitment of Thaw was essentially temporary cannot be seriously questioned. His detention under its provisions was to continue until he should become sane, for the time being, awaiting a contingency, to wit, the restoration to sanity. Other statutory provisions were amply sufficient to procure his release and discharge in the event that he became sane. Under Section 2015 of the Code of Civil Procedure he (or his friends acting for him and in his behalf) was at all times entitled to a writ of habeas corpus to determine the legality of his detention, and upon establishing in such proceeding his then sanity, he was entitled to be discharged. He could not be detained a moment after establishing his restoration to sanity. By Section 74 of the Insanity Law (as amd. by Laws of 1905, Chap. 490, and Laws of 1908, Chap. 261) the lunacy commission is authorized to dis-

charge any patient improperly detained in any State institution. The detention of Thaw, if sane, would have been improper and would have conferred jurisdiction upon the commission to act. This section also provides that "A patient, held upon an order of a Court or Judge having criminal jurisdiction, in an action or proceeding arising from a criminal offense, may be discharged upon the superintendent's certificate of recovery, approved by any such Court or Judge." While it is true that Thaw is not given the right of appeal from the final order committing him, which, under the provisions of Section 63 of the Insanity Law, is given a lunatic committed under the provisions of that statute, such appeal was not at common law, and is not now, a necessary element of due process of law. It is wholly within the discretion of the State to allow or not to allow such a review. (*McKane* v. *Durston*, 153 U. S., 684.) It is clearly apparent, in the light of the provisions authorizing the summary commitment of an ordinary lunatic, and the summary commitment of a defendant in a criminal proceeding, that it was the legislative intent to authorize a proceeding under which the same summary commitment of an insane defendant, acquitted in a criminal case, should be available. Each is committed upon the order of a Judge in a judicial proceeding, acting in the one case upon certificates of medical examiners, and in the other upon evidence taken in open court, during the progress of the trial, resulting in the acquittal of the defendant because of insanity existing at the time of the commission of the crime, and I know of no reason why the State may not confine such a person while his condition continues. Neither case requires the intervention of a jury to constitute

due process of law. The statutes of this State afforded Thaw a simple and ready means of release available at any time when he could establish his restoration to reason, which differentiates the case at bar from the Michigan and North Carolina* cases cited by the appellant, in which States no adequate method was provided for the release of a confined insane person after restoration to reason, which it was held denied, and did not afford to such person due process of law. No such obstacles exist in this State. It is contended that the word "they" in the section under consideration relates and refers to the jury and not to the Court, evidencing the intention of the Legislature that the Court should be without power to commit unless the jury certified that they deemed discharge dangerous, from which it would follow, in the case at bar, that the jury not having so certified, the Court was without jurisdiction to commit. This section was adopted at a time when the former Court of Oyer and Terminer—composed of three—was in existence, and operative for years before the trial of Thaw. He interposed the defense of insanity, and was charged with the knowledge that under its provisions, if acquitted on the ground of insanity, he could be committed. It was competent for the trial Court to receive evidence of his mental condition at the time of the trial. (*People* v. *Koch*, 150 N. Y., 291; *People* v. *Koerner*, 117 App. Div., 40.) Such evidence was received, and the relator had both the right and opportunity to rebut it. The record before us does not contain the testimony given upon the trial, and it is impossible for us to say that the learned Trial Justice did not base

*See *Underwood* v. *People* and *Matter of Bovett* (*post*, p. 175). —[Rep.]

his conclusion upon the evidence of witnesses produced by Thaw as to the type of insanity he was suffering from at the time of the commission of the crime, as well as upon the evidence given by the People. His language indicates this, and the presumption obtains, in the absence of the evidence, that it was sufficient to warrant the conclusion reached. It seems to me that the provisions of Section 454 must be held to have operated as notice to Thaw that his sanity at the time of his trial was open for investigation, and that it would necessarily be investigated in the event of acquittal upon that ground. It was investigated, both sides giving testimony. No request was made by Thaw or in his behalf to be permitted to give evidence upon his present mental condition, and no question was raised as to the power of the Court to exercise the authority vested by Section 454, which constituted a waiver of the right to a trial, either by jury or by the Court, of the specific question of present insanity existing at that time. (*Sporza* v. *German Savings Bank*, *supra*.) In addition to the evidence, there was before the Court the presumption of a continuation of the insanity, established as theretofore existing, by the defendant himself. I think these facts sufficient to establish notice and opportunity to be heard to the extent of meeting the constitutional requirements of due process of law, if such notice and opportunity are required in a summary proceeding of this character, which, in view of the conclusion reached, I do not deem it necessary to consider.

I do not overlook the contention of the learned counsel for the State that the custody of Thaw is under the final order of the Justice in the first habeas corpus proceedings, which it is claimed superseded

the original commitment, thus eliminating from the case the necessity of our considering the questions raised by the appellant, which are based upon the original commitment. Without determining the question presented by this contention, I have regarded it advisable to consider the detention of Thaw as being under the original order and commitment, and to give due consideration to such questions arising thereunder as are brought to our attention by the learned counsel for the appellant.

The relator's exceptions to the refusal of the Special Term to discharge Thaw upon the grounds presented to that Court, do not present reversible error. Upon his trial Thaw had established his insanity at the time the crime was committed. It is presumed to continue until the contrary is shown, which in this case has not been done. His condition had led to one murder, and it cannot be said that the duty devolving upon the Court to safeguard the public by the detention of the prisoner under the provisions of Section 454 of the Code of Criminal Procedure was improperly exercised; the order was a valid adjudication of his then insanity to an extent rendering his liberty dangerous to the public. (*People ex rel. Morrell* v. *Dold*, 189 N. Y., 546, cited with approval in the *Sporza Case*, *supra*.) It was the right of the prisoner at any time thereafter, however, to allege his restoration to reason and consequent sanity, and, if such allegation was denied, to demand that the issue be tried, and to enforce this right he and his friends had at their command the writ of habeas corpus.

I am unable to find any authority under which Thaw was entitled to have the question of fact as to his sanity or insanity tried by the jury as a matter of right; the discretion of the learned Justice

at Special Term was properly exercised, and it follows that the order must be affirmed.

Hirschberg, P. J., concurred.

GAYNOR, J. (dissenting):

Section 454 of the Code of Criminal Procedure is void for being violative of the constitutional prohibitions against depriving any person of "life, liberty or property without due process of law" (U. S. Const., 14th Amendt., Sec. 1; N. Y. Const., Art. 1, Sec. 6). It provides that if the defendant be acquitted on the ground of insanity in any case, *i. e.*, at the time the offense was committed, and is in custody, the Trial Court must, if it "deem his discharge dangerous to the public peace or safety, order him to be committed to the state lunatic asylum, until he becomes sane." No hearing is required in respect of his sanity. The commitment prescribed is final and permanent instead of only temporary for the purpose of a hearing or trial. The requirement is that he be committed "until he becomes sane," thus allowing him to be treated as insane in the discretion of the Trial Court without giving him opportunity to be heard on the question of his present sanity.

It is not disputed that alleged lunatics, the same as alleged criminals, may be temporarily committed without a hearing lawfully in the discretion of Courts and Judges, *i. e.*, until their case can be heard in conformity with the requirement of due process of law; but they may not be committed permanently, any more than alleged criminals, without a hearing of a judicial nature on notice, which, and nothing short of which, is due process of law; and any statute permitting the like is void. This statute prescribes no notice or hearing, and none

was given or had. This latter is unimportant, however, for the test of the validity of the statute is not what was done, but what may be done under it. All of the cases now to be cited decide the general principle, and several of them are still more in point, as they deal with statutes the same or similar to the one now in question (*Stuart* v. *Palmer*, 74 N. Y., 183; *Matter of Kenny*, 23 Misc. Rep., 9; *Hagar* v. *Reclamation District No. 108*, 111 U. S., 701, 708; *Simon* v. *Craft*, 182 *id.*, 427; *People ex rel. Ordway* v. *St. Saviour's Sanitarium*, 34 App. Div., 363; *Underwood* v. *People*, 32 Mich., 1; *Matter of Boyett*, 136 N. C., 415; 67 L. R. A., 972; *Matter of Lambert*, 134 Cal., 626; *State ex. rel. Blaisdell* v. *Billings*, 55 Minn., 467; *Brown* v. *Urquhart*, 139 Fed. Rep., 846; *City of Portland* v. *City of Bangor*, 65 Me., 120; *Chase* v. *Hathaway*, 14 Mass., 222; *Matter of Blewitt*, 131 N. Y., 546). The decision to the contrary in *Matter of Brown* (39 Wash., 160) is disapproved by the learned reporter's note in another report of that case (1 L. R. A. [N. S.], 540).

It suffices to say of the Massachusetts case of *Gleason* v. *Inhabitants of West Boylston* (136 Mass., 489) that the point now up was not there raised or considered at all, much less decided. The statute in that state is that on a verdict of acquittal of homicide on the ground of insanity the defendant shall be committed by the Trial Court to a state lunatic asylum for life, no discretion whatever being given to the Court in the matter; and then the Governor and council are given power to discharge him whenever it appears that may be done without danger to others. The only question in the *Gleason* case was what township or locality was chargeable with the expense of keep of a per-

son so committed, and all that was said was on the unquestioned assumption that a commitment under the statute was valid.

If legislative power exists to qualify the defense of insanity in homicide cases so that a verdict of acquittal on that ground shall be a qualified acquittal only, not entitling the defendant to go free, but on which he shall be committed for life, or for a less time, we have no such statute. Under ours, which relates to indictments for all crimes alike, the acquittal is complete and unqualified. The Trial Court is not required by it to commit the defendant on or by virtue of the verdict, but is only given power to commit him after the verdict if he be then insane, according to its judgment and discretion, but only if he be in custody; and it is permitted by the statute to exercise such judgment and discretion without a hearing. It is the same as though the statute gave such power to some other Court or Magistrate on the defendant's acquittal. The order of commitment does not follow and is not made on the verdict, but on the judicial conclusion made afterwards that the defendant is not only a lunatic but a dangerous one at the time of his acquittal, and such conclusion is not permissible except on due process of law.

But, it is asked, if the Legislature had the power to enact that on a verdict of acquittal on the ground of insanity at the time the homicide was committed, the defendant should be committed by the Trial Judge in every case, simply on the verdict, how is the defendant injured by a statute permitting him to be committed only if the Trial Court should in his discretion deem him insane at the time of acquittal? The question is scarcely plausible, and we do not need to grope for an answer.

If the Legislature wanted a defendant to be committed simply on such a verdict of acquittal, it would have so enacted. But it did not want that, but only that he should be committed if insane at the time of acquittal, and not even then unless he should be dangerous to the public peace or safety, and it delegated the decision or finding of that fact to the Trial Court after the verdict; and the statute is void because it permits it to do so without giving the defendant a hearing. There are many things that the Legislature may do, as matter in its legislative jurisdiction and capacity, but the doing of which, if delegated by it to any officer or tribunal as a matter of judgment and discretion, becomes judicial, and may only be done by such officer or tribunal by due process of law; as, for instance, is the familiar and often applied rule in the matter of taxation and assessment. The Legislature may apportion and cast a tax or assessment, as a matter of legislation, but if it delegate the doing of it, the official, board or tribunal to whom it delegates it can act only on due process of law, *i. e.*, after a hearing on notice (The Taxing Power, etc., 42 Alb. L. J., 64, 68).

The contention that the trial of the defendant's plea of insanity at the time he committed the offense was a trial of the question of and established his present insanity, by aid of the presumption of the continuance of insanity, once it be established as of a given time (*Cook* v. *Cook*, 53 Barb., 180), is fallacious. While such presumption of continuance was evidence of present insanity, it was not conclusive evidence. It is only a presumption of fact, and the defendant was entitled to opportunity to rebut it like any other evidence. Such a presumption might suffice as a foundation for a stat-

ute to temporarily commit him to give him a hearing, but not for a statute to permanently commit him without a hearing. There may also have been evidence given on the trial of the indictment tending to prove that the defendant was then insane; but that would leave us, at most, with the same case still, viz., with evidence which the defendant was entitled to opportunity to rebut. The issue of insanity on the trial was only whether the defendant was insane at the time he committed the offense, and that is all that the verdict could establish. The notion that he was also at the same time perplexed and in jeopardy with an issue of his present sanity, of the trial of which the said statute in and of itself gave him due notice, is without foundation. He was not in the evil case of being tried at the same time on an issue of his present sanity before the Judge and of his past sanity before the jury. The only notice the statute gave him was that if he should be acquitted the Trial Court might summarily commit him as a mere matter of discretion, and *sua sponte*, not as an alleged lunatic and for the purpose of a hearing, but as a lunatic and "until he becomes sane."

To say that since he is not remediless, that as he may resort to the writ of habeas corpus or some other means of a hearing to establish his sanity and regain his liberty, he is not deprived of due process of law, is to miss the purpose of that safeguard, with all due respect to judicial opinions which suggest the thing. It requires that a hearing be given before a permanent judgment or order depriving one of his liberty, and does not intend the hearing which he may afterwards be able to get by dint of seeking relief against his unlawful commitment. A principal office of the writ is to get

people out who have been committed without due process of law, and on that ground.

While the decision in the recent case of *Sporza* v. *German Savings Bank* (192 N. Y., 8) is not in point, it is instructive by analogy as showing the policy in this state of careful application of the constitutional provisions for the protection of liberty and property to alleged incompetents. All of the Judges there agreed that an alleged incompetent had the right to have the question of his incompetency not only tried, but tried by a jury, before a committee of his person or of his property may be appointed.

And the provisions of our Insanity Law for the commitment and custody of lunatics (Chap. 545, Laws of 1896, a codification of former statutes) shew the same care to preserve the benefit of the said constitutional safeguard. By them a Judge of a court of record is empowered to commit an alleged lunatic to a lunatic asylum on the certificate of two physicians, medical examiners in lunacy, with or without notice to the lunatic, according to his condition, or the urgency of the case. But the alleged lunatic, or any friend of his, is given by them the right and opportunity in the same proceeding to have a jury trial of his sanity forthwith after the making of the order of commitment, or at any time within 10 days. No new proceeding has to be originated. In that way the requisite of a hearing on notice, *i. e.*, of due process of law, is provided for; and such notice is also requisite under the provisions of the Code of Civil Procedure for the appointment of a committee (*Matter of Blewitt*, 131 N. Y., 541). But the commitment provided for by the statute here in question is not under the Insanity Law, and the said

provisions of that law do not apply to the case of one so committed.

The claim of the relator that he cannot be permanently committed as a lunatic without a jury trial is well taken only if the said statute under which he was committed is void. In that case he could be committed and detained only under the Insanity Law, there being no other way provided by law; and that, as we have seen, gives him the right to a jury trial.

Under a former writ of habeas corpus a hearing was had on the question of this relator's sanity before the Judge who issued it, after his claim that the said statute under which he was committed was void had been overruled. It was had on the theory of the learned Judge that the relator had been lawfully adjudged a lunatic and committed, and if that were so would have been regular. But that not being the case, the hearing was not permissible, and cannot supersede or take the place of the trial by jury which the relator was entitled to as a prerequisite to his permanent commitment. The proceedings and safeguards prescribed by the Insanity Law were the only course open against the relator from the beginning. He should have been committed in the way prescribed by it or not at all.

The order should be reversed and the relator discharged, unless within five days he be committed under the Insanity Law.

Order affirmed, without costs

SUPREME COURT, U. S.
FILED
DEC 8 1914
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 514.

HERMAN A. DREW, SHERIFF OF COOS COUNTY, STATE OF NEW HAMPSHIRE, APPELLANT,

Against

HARRY KENDALL THAW, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT, DISTRICT OF NEW HAMPSHIRE.

BRIEF OF P. C. KNOX ON BEHALF OF THE APPELLEE.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 514.

HOLMAN A. DREW, SHERIFF OF COOS COUNTY, STATE OF NEW HAMPSHIRE, APPELLANT,

vs.

HARRY KENDALL THAW, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT, DISTRICT OF NEW HAMPSHIRE.

BRIEF FOR APPELLEE.

PART I. A STATEMENT OF THE CASE, PRESENTING THE QUESTIONS INVOLVED.

This is an appeal from the final decision of the judge of the United States District Court for the district of New Hampshire, granting and sustaining a writ of *habeas corpus* sued out by the appellee, and ordering the appellee's discharge from custody.

The Federal Question.

The Federal question involved in this proceeding is this—Shall the Federal courts, acting under the appropriate provisions of the Federal Constitution and statutes and under and upon a writ of *habeas corpus*, release from custody one who has been committed by the chief executive of one State for surrender to the executive authorities of another State upon an extradition requisition, the crime charged being conspiracy of an alleged and avowed lunatic, with others, to escape and escape from a lunatic asylum; or, shortly put, may an adjudged and avowed lunatic escaping, be extradited for conspiring to escape and escaping from a madhouse.

The Contentions of Appellee, to Which This Brief is Confined.

The contentions set forth in this brief for the appellee are (other points are covered by briefs filed by other counsel):

(1) That interstate rendition does not lie, except upon charges of crime, and that the acts here charged do not constitute a crime within the meaning of the Federal Constitution; and,

(2) That where, as here, the papers submitted by the demanding State set forth facts which on their face negative the fact of criminal responsibility, the accused is entitled to be discharged from custody upon a duly instituted writ of *habeas corpus*.

The Chronology of the Case.

The material chronology of this case, taken from New York's motion to advance its hearing in this court, and appearing elsewhere in the record, is this: In January, 1908, Harry K. Thaw was tried in New York for the murder of Stanford White and acquitted on the ground of insanity.

On the first of February, 1908, he was committed to the Matteawan Asylum by the trial judge under section 545 of the New York Criminal Code, which provides—

> "When the defense is insanity of the defendant the jury must be instructed, if they acquit him on that ground, to state the fact with their verdict. The court must, thereupon, if the defendant be in custody, and they deem his discharge dangerous to the public peace or safety, order him to be committed to the State lunatic asylum, until he becomes sane."

The trial court, finding the essential facts against him, committed Thaw "to be kept in the hospital until thence discharged by due course of law" (*Vide*, Record, p. 107).

This commitment was without any hearing or evidence of Thaw's mental condition at the time of his committal other than that which was adduced to the jury and had reference to his mental condition in 1906, at the time of the alleged homicide. In May, 1908, four months after his commitment, Thaw obtained a writ of *habeas corpus* from Justice Morschauser, under which he sought his liberty on the ground of sanity. After hearing, the writ was dismissed and he was remanded to the asylum as insane. On June 26, 1908, Thaw sued out another writ of *habeas corpus* before Mr. Justice Mills, challenging the constitutionality of the law under which he was originally committed. This was determined against him and he was again remanded to the hospital. Upon appeal, the judgment of the lower court was affirmed, the Appellate Court holding that Thaw was lawfully committed under the police power of the State and that his insanity, found by the verdict of the jury, was presumed to continue until his cure was established. (Record, p. 69.)

June 1, 1909, Thaw sued out a third writ of *habeas corpus* before Mr. Justice Mills, claiming restoration to sanity. A large number of witnesses were examined, many of them distinguished alienists, but he was remanded as insane. (Record, p. 69.)

In the spring of 1912 the proceedings upon a fourth writ of *habeas corpus* resulted in the same way. (Record, p. 69.)

It thus appears that Thaw was adjudged insane five times between 1908 and 1912. He was adjudged to be insane in 1908 by the verdict of a jury. He was adjudged to be insane in January, 1908, when he was originally committed to Matteawan, by the trial judge by force of the presumption that his insanity continued until proof of cure. He was adjudged to be insane again in June, 1908; June, 1909, and in 1912, when he was remanded because he had not overcome the force of the presumption attaching to the original adjudication and in the brief opposing the application for bail in this court the Attorney General of New York alleged Thaw to be presently and incurably insane. This brief was filed on the 12th day of June, 1914.

August 17, 1913, Thaw escaped from the hospital. Found in New Hampshire, the State of New York sought his extradition for the crime of conspiring to defeat the due administration of justice in New York by conspiring to and escaping from Matteawan, an act in itself not a crime. (Record, pp. 69-73; for requisition papers see pp. 75-112.)

The Record Shows Appellee is Insane.

The fact of Thaw's insanity and of his escape from an asylum in which he had been confined because he was a dangerous lunatic clearly appears from the record in this case.

The indictment finally secured against the appellee in New York County (a county in which Thaw was not confined and through which he did not pass in the course of his escape), after an unsuccessful attempt to secure an indictment by the grand jury in Dutchess County, the county in which Matteawan is located, in which Thaw was detained and from which escaped, contains the following recitations: (1) That the commitment of Thaw to the Matteawan Asylum was because he was insane and that his discharge at

that time was dangerous to the public safety; (2) that the Matteawan State Hospital was "duly established by and under the laws of the State of New York to be used for the purpose of holding in custody and caring for such insane persons as might be committed thereto by courts of jurisdiction of the said State"; (3) that Thaw, being then and there so in confinement in the said Matteawan State Hospital as aforesaid, did, with others, "unlawfully, fraudulently and maliciously combine, confederate and agree together * * * to cause and procure the said Henry K. Thaw to escape from the said hospital and illegally to go at large * * * to the great and manifest perversion and obstruction of justice and of the due administration of the laws"; (4) that the said Thaw "in pursuance and furtherance of and according to the said conspiracy, combination, confederacy, and agreement as aforesaid and to effect the purposes thereof, * * * did illegally leave and escape from the said Matteawan State Hospital * * *"; and (5) that pursuant to such conspiracy, confederation, agreement, etc., certain other persons named "did thereupon take, carry and accompany the said Harry K. Thaw in the said automobile from and out of the said County of Dutchess and from and out of the State of New York, against the form of the statute," etc. (See Record, pp. 118 to 122.)

One Raymond F. C. Kieb, in a deposition annexed to the indictment, deposes and says: "I am the principal complaining witness against the above-named Harry K. Thaw who is charged with having * * * conspired with * * * [naming others likewise indicted] * * * to cause and procure him, the said Harry K. Thaw illegally and fraudulently to escape from the Matteawan State Hospital where he was then confined, and pursuant to such conspiracy having thereafter committed various overt acts among which was his illegally escaping from the said hospital * * *" (*op. cit.* p. 125).

These quotations are taken from the third and last requisition which was filed by the State of New York in this

case. The information upon which the first requisition was issued by the Acting Governor of the State of New York, on September 12, 1913, said information being by Edwin A. Conger, District Attorney for the County of Dutchess, recites that "one Harry K. Thaw * * * [with others named] * * * did wilfully, knowingly, corruptly and falsely commit the crime of conspiracy against the People of the State of New York, by conspiring among themselves to commit acts for the perversion and obstruction of justice and the due administration of the laws and to commit a crime by conspiring and arranging and planning to effect and produce the escape of one Harry K. Thaw, a prisoner duly committed to and confined in the Matteawan State Hospital, a criminal insane hospital of the State of New York, and by arranging, procuring, planning and carrying out the escape of the said Harry K. Thaw, whereby * * * said Harry K. Thaw * * * did escape from the Matteawan State Hospital for the criminal insane, at the city of Beacon" (*op. cit.*, p. 79.)

Finally, in the Papers in Opposition to Bail (p. 14), filed by the appellant in this court, Thaw is declared, in a formal affidavit, to be presently and incurably insane.

Extradition was granted by the Governor of New Hampshire, but upon a writ of *habeas corpus* the District Court of the United States for the District of New Hampshire decided that the constitutional right of extradition did not apply in the case and sustained the writ. From this decision the State of New York brings its appeal to this court.

Discussion of General Matters.

There are some general matters which it may be advisable to bring to the attention of the court by way of explaining away the general spirit and atmosphere which the representatives of the demanding State have sought and are seeking to throw around this case. This is expressed in the motion to advance the argument in this court in these words of its learned Attorney General:

> "It is the earnest desire of the People of the State of New York, as well as the officials acting in their behalf, that this scandal cease and that Harry Kendall Thaw be immediately returned to the custody of Matteawan State Hospital under the order aforesaid made by its Supreme Court, so that it may not be said that the power or influence or means of Harry Kendall Thaw or those acting in his interest or behalf is so powerful that they can subvert the due administration of the laws of the State of New York" (Motion to Advance, page 17).

And later in the Attorney General's brief in this court (p. 55) we find these words:

> "The custody of the body of Harry K. Thaw is of no importance *per se* to the State of New York. It would be only too glad to be freed from the recurring scandals in which his control of wealth involves the administration of the law."

1st. In the first place, it cannot be overlooked that, from the time of the shooting of White until the escape from Matteawan, the State of New York has had the appellee within its sole jurisdiction and control. If the officials of New York consider that justice has at any time failed as against this accused, the responsibility therefor must fall on them, the blame must attach to State agencies, which are thereby admitted to be either inefficient or defective. It is not just to censure the accused for the shortcomings of the judicial system of the State of New York.

2d. The proposal of a State to secure through State rendition the return to it of an adjudged lunatic not one of its citizens, who has left its jurisdiction, is so unusual as to merit some thought and consideration. Admissions, such as the one just quoted, are not wanting in this case to show that the real purpose of the continued imprisonment of the appellee in the insane asylums of New York is to inflict punishment upon the appellee for the commission of an act

which a New York jury has declared was not a crime under the circumstances of the case.

This is intensified by other facts appearing in the record, which seem to evince a disposition to take vengeance on the accused for his alleged initial crime, a purpose heretofore practically unhampered.

Up until the present time the venue of every trial and hearing which the appellee has secured has been in the State of New York. It is not without significance that when now for the first time the appellee has secured before tribunals and commissions, other than those local to the place in which the initial act was committed, a hearing both as to the alleged dangerous nature of his insanity and as to the legality of his detention, the courts and commissions before which he has come have declared his continued custody improper and have pronounced him no longer a danger to the community in which he may be.

Grant that the immediate purpose of the return of this appellee to New York is to try him for the crime which has been charged, yet no one can question that the ultimate purpose is, as alleged by the Attorney General, to secure the return of the appellee to Matteawan. It is not believable that New York burns with desire to convict Thaw of walking out of the open door of a madhouse, a thing that any insane man might do and every sane man would do under the circumstances. Therefore in effect this is an effort to use extradition process to secure the return to an insane asylum of a person adjudged in New York as insane. It is fundamental that extradition proceedings may not be used to accomplish anything else than the return of a fugitive criminal for trial and punishment for his crime.

Much has been said, and the matter has even been mooted here, about the power of the appellee's wealth and his use thereof in defending himself in the various proceedings which have been taken. It is well for him that he has had funds to defend himself against the limitless resources of the Empire State of this Union, all of which resources were at

the command of those prosecuting him. There is disparity in this, but it is all against the appellee and in favor of the State. But for his friends' ability to defend him, he never could have secured that modicum he has obtained of the full protection to which the law entitled him, thus preventing in some degree what is sometimes termed "railroading" through the courts. The uncandidness of this suggestion is demonstrated by the facts that Thaw has been in confinement for eight years, six of them in a madhouse; has failed in every effort he has made in the courts to secure his release; that the only legal victory he has won was in the United States court in New Hampshire, where he succeeded in having the court decide the obvious principle that a person adjudged insane cannot be extradited for alleged crime, and even in that case he was denied his release on bail, although the alleged crime was a misdemeanor and the court found him to be of harmless disposition. These facts do not suggest the power of wealth, but rather why Don Quixote admonished Sancho Panzo when he installed him as Governor of Barataria to avoid the inclination to be unjust to the rich.

The Exact Question Before This Court.

The question before this court is not whether this man is dangerous to the community in which he resides (a New Hampshire commission has found he is not); it is not whether he is so helpless that he needs a caretaker; it is not whether the New York courts and prosecuting officers failed to inflict proper punishment when they put him on trial for his life; it is not whether punishment should continue to be imposed upon him under the guise of detention with lunatics. The simple question here is, Ought this adjudged lunatic to be extradited for the alleged crime of conspiring to escape and escaping from a madhouse?

A decision by this court that a person should be surrendered on State rendition upon the charge of conspiring to escape and escaping from a lunatic asylum would open up

limitless possibilities for the oppression of American citizens and the depriving them of their liberty.

The questions of law involved in this appeal are just the same as they would have been if a pauper lunatic had availed himself of an open gate in an asylum yard and, through the assistance of friends, made good his escape. The fact that in this case the appellee or his friends are able to employ counsel—a not unusual circumstance and one not to be deplored—throws no light upon the questions of law involved and will in no degree affect their decision and so I dismiss all further reference to the alleged wealth of the Thaw family as unworthy of consideration in this presence, and come at once to the legal questions involved in the appeal, and the main one is, Does the State of New York charge Harry Thaw with crime within the meaning of the Constitution of the United States? Or, putting the question as I am warranted by the repeated averments by the State of New York,—Was the act with which Thaw is charged a crime, he having been repeatedly adjudged insane and being presently and incurably insane at the time of its commission? (See Papers in Opposition to Bail, p. 14.)

Article IV, section 2, of the Constitution of the United States provides:

> "A person charged in any State with treason, felony or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having *jurisdiction* of the *crime*."

Thaw was committed to Matteawan in 1908 solely upon the theory of the continuance and force of the presumption of his insanity that was established in 1906, and he was recommitted in 1908, 1909, and 1912 on the ground that that presumption had not been overcome by proof of cure.

The law laid down in all the Thaw cases was that the burden was on him to establish a cure in order to secure his

release. Similarly, the burden would be on New York to show that a man whom it held in custody as a dangerous lunatic for six years, and who had been repeatedly so adjudged, knew the nature of the crime charged against him while in confinement.

Appellant's position is this (*vide* argument in support of point IV, appellant's brief): A verdict of not guilty upon the ground of insanity rendered by a jury in a homicide case determines only that the defendant did not at the time of the homicide have the intellectual capacity to appreciate the wrongful nature of that particular act, and while there may be a presumption that his homicidal mania continues until proof of cure, there is no presumption that his mental defect extends to a failure to discriminate between right and wrong in ordinary misdemeanors that he may commit during his confinement as a dangerous lunatic. In other words, if he steals a spoon from the dining table the day after his commitment to the asylum or escapes from his confinement he is presumed to know the wrongful nature of larceny and escape, and must be tried in the criminal courts for his offense, and the burden of proof is upon him to establish that his mental defects which incapacitated him from understanding the command of God and man that "thou shalt not kill" also extended to the less obvious turpitude involved in an ordinary misdemeanor. Such reasoning leads to the flat absurdity that it would not be until an insane person had exhausted the whole category of crimes, been tried on each offense, and shown in detail his mental incapacity that he would get the benefit of the presumption that has always heretofore been recognized as the law.

I do not question the soundness of the proposition of law advanced by appellant and sustained by the New York and other cases cited to the effect that the burden of proof to establish his defense is upon one who defends a charge of crime upon the ground that he was insane. But appellant ignores the fact that such is the law for the presumptively sane, not the presumptively insane.

I agree that such is the law in New York, and being the law it is certain that in Thaw's trial the jury were carefully instructed accordingly, and that the effect of the verdict not guilty because insane establishes a status of general irresponsibility which must be overcome by those who allege it. In such cases, as in all others, it is as Mr. Justice Harlan once said, "just as necessary to plead as it is to prove."

It is significant that in this case there is not only no attempt by the appellant to overcome by plea or proof this presumption of irresponsibility, but that on the contrary the evidence offered and allegations made by the appellant, as disclosed in the Record here, abundantly establish the continuing force of such presumption, and indeed go to the very fact of the appellee's present and incurable insanity.

There is no asylum where there are not, almost daily, acts committed, which, if done by sane persons, would be crimes. Assaults upon keepers; assaults, sometimes of a murderous character, upon each other or upon visitors; attempts at arson; offenses, in short, of all characters. Did anyone ever hear of a State indicting a lunatic in custody, or a court trying a lunatic on such a charge, or holding in such a trial that, while the law presumed him to be a lunatic while confined as such for the protection of society, yet the burden of proof was upon him to show as to the particular offense charged that he had not the mental capacity to distinguish its wrongful nature. The discipline of asylums and the strict confinements and other measures of restraint or punishment can only be justified upon the theory of the irresponsibility of adjudged lunatics.

That Thaw is insane is not only to be presumed from the verdict, but the record in this case contains many averments to that effect.

Thaw's application to be released on bail was resisted by the State of New York upon the ground that he is presently insane and has been ever since the verdict by the jury in the homicide case.

The case in this aspect resolves itself to the single proposi-

tion, Can an insane man be extradited for and tried for crime?

Sec. 1120 Penal Code, State of New York, says:

> "An act done by a person who is an idiot, imbecile, lunatic or insane is not a crime."

Therefore, the proposition may be correctly stated, Can a man be extradited for crime whose act is not a crime?

Thaw was entitled to his discharge on the verdict of the jury finding him insane, and would have been discharged subject to the care of his relatives or of the exercise of the *parens patriæ* power of Pennsylvania, the State of his domicile (*Vide* Record, p. 67), or the exercise of the police power of New York or any other State in which he was found. The only authority the trial court had under the New York law to refuse his discharge was if the court deemed his discharge "dangerous to the public peace or safety;" that is, dangerous to the peace and safety of the public of New York. There is no suggestion in the law that he could or should be looked after as a ward under *parens patriæ* power or otherwise. I do not see how anyone can safely contend that a dangerous lunatic should be brought back to a jurisdiction, through which he had passed, to be there confined for the safety of the people of that jurisdiction, who in his absence could not possibly be menaced; or how one who had escaped a confinement based solely on the jurisdictional fact of his being a menace to the people of the jurisdiction from which he escaped could be brought back to that confinement on a theory of *parens patriæ* power.

It cannot be truthfully said that a crime is charged when the law distinctly says the alleged act is not a crime. An act of conceded turpitude is not a crime when committed by a lunatic or infant of indiscretion, and one is presumed to be a lunatic in the absence of proof of cure who has been so adjudicated and is confined for the public safety, and his right to his freedom and his responsibility for his acts begin

only after his cure has been established. This right and responsibility are coincident.

Thaw was denied his discharge and restrained of his liberty in 1908 because of the presumption that his insanity, determined by the jury, continued in the absence of proof of cure. He was recommitted in 1908, 1909, and 1912 because he was unable to overcome the presumption of continuing insanity by proof of cure and is now dangerously and presently incurably insane according to the allegation of the State of New York in June, 1914, as will appear from the record of this court in the matter of Thaw's application for bail.

He was deprived of his liberty in New York on the strength of the presumption of continuing insanity, and the present proposition is to deny him his liberty in New Hampshire on its weakness. He bore the burdens of the presumption in the one case and they seek to deny him the benefits of it in the other.

Thaw challenged the validity of his commitment without a hearing on the presumption of insanity, but the New York Court of Appeals (People *ex rel.* Peabody *vs.* Chanler) sustained a decision that "upon his trial Thaw had established his insanity at the time the crime was committed," and that "it is presumed to continue until the contrary is shown," and, further, that "the commitment was made in the exercise of the police power of the State."

In People *ex rel.* Peabody *vs.* Chanler [(1909), 117 N. Y. Sup., 322], Jenks, J., said:

> "Such a commitment is not for the punishment of such a defendant, for there can be no punishment for him who has been acquitted, but it is for precaution for the public, made in the exercise of the police power of the State, which permits the restraint of an insane person who at large would be a danger to the peace and safety of the people. The commitment can last only so long as the defendant is insane, and he has the right at any time under the law to have his sanity determined upon *habeas corpus*.
>
> * * * * * * *

"In fine, I think that the legislature contemplated that upon the trial for a crime the investigation into the insanity of the defendant at the time of the commission of a crime pleaded by the defendant might satisfy the court that, if the defendant were entitled to be freed absolutely upon an acquittal based upon such insanity, the verdict would not only exonerate the defendant, but, in effect, might let loose one then so insane as to be a menace to public peace and safety, and that, therefore, the legislature expressly limited the effect of such an acquittal in the exercise of the police power, so that it might not be an absolute discharge in course, but that the court might order the detention of the defendant as a dangerous insane person until his reason was restored. And I think that such a defendant by this provision of the Code of Criminal Procedure had notice and a hearing that contemplated the process whereby he might thus be committed, and that, in any event, the provisions of express law whereby he could forthwith institute proceedings to establish his sanity and his consequent right to instant discharge satisfy the safeguards invoked against this provision of the law."

Rich, J., said, in the same case:

"In other words, if the State has the authority and legal right to summarily deprive an alleged insane person not charged with crime of his liberty temporarily upon evidence contained in the certificates of two medical examiners in the discharge of its duty to protect the public from the danger liable to result from his disordered and insane acts, it is charged with the same duty, and has the same authority and legal right (upon sworn testimony received upon the trial in the presence of the lunatic and his representatives, which it is his right to controvert if not true), to act summarily in depriving the defendant of his liberty temporarily for the protection of the public."

In People *ex rel.* Thaw *vs.* Lamb [(1909), 118 N. Y. Sup., 389], the court, by Mills, J., said:

"The second of the four prior determinations was the verdict of the jury upon the second murder trial

acquitting the prisoner upon the ground of insanity. It seems plain that such verdict must be regarded here as *res adjudicata* between the people and any of their representatives acting in their interest, and the prisoner here, to the effect that he was, at the time of the commission of the homicide, insane to the degree that he did not then know the nature and quality of the homicidal act he was committing, or did not know that such act was wrong. It seems equally clear that the natural presumption of fact follows that such condition of insanity has continued to the present time. The effect of such presumption is to cast upon the prisoner here the burden of proving that since the commission of the homicide he has become sane to the degree that it is reasonably certain that his enlargement now will be without menace to the public peace or safety. Where insanity has gone so far as actually to take human life, no sensible person will be satisfied with evidence of recovery which does not attain to the degree of reasonable certainty. At the beginning of the trial the court here so ruled, both as to the burden of proof and the degree of requisite evidence. Such ruling was accepted by all the counsel without objection or demur."

There is a certain grim humor about the proposition that a man can be deprived of liberty because he is so insane that he is likely to commit a crime for which he is irresponsible, then if he commits one, to endeavor to hold him responsible on the ground that he was sane. It is the fact of irresponsibility that justifies the confinement. It would be a solemn mockery of justice to restrain a man of his liberty on the presumption that he is insane, and at the same time hold him to responsibility on the presumption that he is sane, or to send him to trial on a record that discloses no crime and one on which he is bound to be acquitted in the absence of allegation and proof of cure which are entirely absent in this case.

The New York trial court would be bound to say on the record as it stands in this case that Thaw was not charged with crime. Can this court, whose function under the Con-

stitution is to determine if he is charged with crime in New York, reach any other conclusion?

The Power of Parens Patriæ.

In the court below the Attorney General of New York argued there are two things apparent in this case:

> First. "A ward has escaped from legal guardianship."
>
> Second. A crime has been committed in the commission of which A (the ward) was a participant.

But the Attorney General adds:

> "If by the pending proceeding the State of New York was simply seeking to recover the custody and guardianship of the petitioner as an insane person it would have mistaken its remedy."
>
> "This is not what the State of New York is seeking to do by this proceeding. The matter of the custody and guardianship of the petitioner as an insane person is one that at present the State of New York is not at all concerned with. This is an entirely subordinate and comparatively unimportant matter to the State of New York, and may well be left for subsequent determination."
>
> "What the State of New York seeks by these proceedings under the United States Constitution and U. S. Revised Statutes is to secure the body of the petitioner that it may punish him for the crime committed in the State of New York."
>
> "It seeks to vindicate its outraged laws by the trial, conviction and punishment of the petitioner and to do this the only method open to it, and the one prescribed by the Constitution and statutes of the United States, is the one it has chosen, namely, extradition."

I might here safely drop the consideration of the first point and accept the Attorney General's assurance that New York cares comparatively nothing of its alleged relation of guardian of Thaw, and that it does not seek his custody for his

protection, but for his prosecution—singular as that sounds when the relationship and its purposes are considered—were it not for the fact that in this court the Attorney General makes another and contradictory statement in his motion to advance the case, wherein he says (p. 17, Motion to Advance) that its purpose is "that he be immediately returned to the custody of Matteawan State Hospital under the order (the original commitment) made by its Supreme Court." That is to say, that he should be extradited for escape from what the Attorney General alleges was guardianship control. This frank statement of the purpose for which Thaw's extradition is sought presents the novel proposition that one may be extradited, not for crime, but so that he may be confined to protect a community of which he is not a member against his possible irresponsible acts of a criminal nature. In short, that he may be removed from a State whose police power is adequate to deal with him if he is dangerous and taken to another State within whose peace he is not abiding, to be there confined as dangerous to a people he is seeking to avoid. To import a menace to the public peace would be a curious function for the police power. It suggests importing infection for the good of the public health.

I agree that the learned Attorney General and the learned court below in their respective statements that the extradition law cannot be carried into such a field, are correct. But I cannot accept the proposition discussed at bar and in the opinion below that there is any such relation of guardian and ward or *parens patriæ* between the State of New York and Thaw.

Thaw did not escape from guardianship control, but from police control. His commitment to Matteawan the appellate court said "was made in the exercise of the police power of the State." (People *ex rel.* Peabody *vs.* Chanler.)

The authorities clearly sustain these propositions:

1. That the *parens patriæ* power has been recognized and exercised from time immemorial.

B. That it is a political relationship existing only between sovereign and subject and for the subject's protection.

C. That the confinement of the dangerously insane for the public protection in the exercise of the police power has no relation to the *parens patriæ* power, has its origin in the statutes enacted long subsequent to the recognition of the *parens patriæ* power, and operates in a different field and for a different purpose, the one having in exclusive view the protection of the public, the other the care and protection of the ward.

The *parens patriæ* power is protective, not punitive nor police. It is invoked only to help the helpless and to protect his person and estate. It is a prerogative of sovereignty usually committed to the chancellor. It is a duty the sovereign owes the subject in return for his allegiance. New York has never exercised it or sought to exercise it, and cannot exercise it in respect to Thaw, a citizen of Pennsylvania.

New York's relation to Thaw was that of a prosecutor, and in the issue joined between that great State and Thaw the stake was Thaw's life. Thaw was acquitted. New York's present relation to him is just the same as to every other person. She may defend her peace against him, her courts having found him dangerously insane, if by his presence in her jurisdiction he menaces her peace.

What the purpose may be of alleging in an extradition proceeding that "a ward has escaped from legal guardianship," then that his extradition is sought only to punish him for crime, and finally that the purpose is to have him immediately returned to the alleged guardianship control, I cannot discern, but if these allegations in any way raise the question of the right of the State of New York to exercise *parens patriæ* control over a citizen of Pennsylvania domiciled within that State, I respectfully insist that no such right or power exists.

The authorities cited in the memorandum attached to this brief I believe abundantly sustain these propositions.

Appellant's Alternative Proposition Regarding Criminal Responsibility.

The State of New York seeks to avoid the force and effect of the rule that there is no intent where there is no mind, and that there is no mind where the person is insane, by claiming in argument either (1) that the appellee has some peculiar kind of insanity, which makes him sane as to one series of actions and insane as to others, or (2) that while he is a mere lunatic, that is, possesses no special but a general form of insanity, he has lucid intervals, and *seemingly* that the crime here alleged was committed during his lucid interval. [Respondent's brief *In re* petition of Harry Kendall Thaw for writ of *habeas corpus*.]

It is not clear upon which of these alternative propositions the State of New York intends to stand. Both involve appellant in difficulties. The second is predicated upon the confinement of a responsible person in an asylum for the insane, such an outrage against the liberty of a citizen as could not be tolerated.

As to the form of insanity, the following showing on the record should be noted.

It appears from the indictment in this case [Record, pp. 107, 119] that the appellee was, on February 1, 1908, committed to Matteawan on the ground that he was insane. It was not stated that he had any particular form of insanity.

[See also the exhibit attached to the affidavit of Dr. Kieb, submitted with the first requisition request, Record, p. 82.] p. 82.]

There is in the record nothing except allegations of counsel made *arguendo* to show that Thaw had any special or peculiar kind of insanity.

This afterthought is completely disposed of by the fact as set out in Mr. Jerome's affidavit (Papers Relating to Bail, p. 10 of Exhibit A thereto attached) that "none of the ex-

perts at the second trial" (the trial upon which Thaw was acquitted) "expressed any opinion as to the form of Thaw's insanity and no evidence upon this point was given."

Coming now to the alternative suggestion that this appellee has lucid intervals, that during these he may entertain a criminal intent, and so commit a crime.

It may, in the first place, be said that no such lucid interval has been alleged or shown by any evidence whatsoever in this record.

Again, it is a well-settled principle that where insanity is once shown it is presumed to exist until the opposite is shown, and the onus of proving it is on the one asserting the sanity. The rule in New York has been set forth as follows:

In Peters *vs.* Peters [(1893), 22 N. Y. Supp., 764, 766 (which was an action to recover moneys from a son to whom had been delivered certain sums found on his mother's person when she was committed to Blackwell's Island)], the court said:

> "A derangement of mind proved or admitted to exist at any particular period is presumed to continue until disproved, unless the derangement was accidental, being caused by the violence of a disease. Greenleaf's Ev., par. 42."

In Cook *vs.* Cook [(1869), 53 Barb., 180, 182 (action for divorce on the ground of adultery, to which the defendant pleaded a record adjudicating her a lunatic, some two or three years before the act of adultery, which record remained unreversed)], the court declared:

> "This inquisition was found in January, 1865. The judgment followed the inquisition, and it proved the lunacy at the time the inquisition was taken; and as a rule of evidence, the presumption at the time of the trial, was that such lunacy continued and existed at the time of the adultery. But this presumption could be rebutted by evidence; and the plaintiff was at liberty to prove that the defendant was sane at the time she committed the adultery. (Jackson *vs.* Van

> Dusen, 5 John., 159; Jackson *vs.* King, 4 Cowen, 216; Greenl. Ev., 42; Starkie Ev. Vol. III, p. 1709; Hix *vs.* Whitmore, 4 Metc., 545). It is unnecessary to multiply authorities. It being established that insanity existed at a certain time, it is presumed to continue, and the onus of proving sanity at a subsequent time is upon the party alleging it, or who seeks to hold the person once insane responsible for his act."

Again, the statute under which the appellee was committed to Matteawan provides as follows:

> "When the defense is insanity of the defendant the jury must be instructed, if they acquit him on that ground, to state the fact with their verdict. The court must, thereupon, if the defendant be in custody, and they deem his discharge dangerous to the public peace or safety, order him to be committed to the State lunatic asylum until he becomes sane." [Printed Record, p. 68.]

It must be that this statute measures the authority of the committing judge in any case. He cannot go beyond. Under this statute, so soon as Thaw becomes sane, he was entitled to his release. That is, as Mr. Justice Mills said in Thaw *vs.* Lamb, *supra*, as soon as he has "become sane to the degree that it is reasonably certain that his enlargement will be without menace to the public peace and safety," he may go free.

It is submitted that it is thus perfectly clear that this appellee must for the purposes of this case be regarded as insane and subject to all the liabilities and entitled to all the privileges which such a status imposes or gives to him. The authorities of New York cannot play fast and loose here; they cannot have this appellee sane when he escapes from a lunatic asylum, in order that they may supply a necessary intent to an alleged crime, and dangerously insane when they oppose his release.

On the record this man must be regarded as insane, and his extradition must be considered from that viewpoint.

Nor is this a case in which it is sought (as in the Charlton case, 229 U. S., 427), to set up the plea of insanity as a defense to the charge of crime, and to establish the plea by evidence *aliunde* the record. The Charlton case settles once for all that the plea of insanity so offered, going as it does to the guilt or innocence of the crime charged, need not be examined by the authorities committing for extradition, and cannot be considered on *habeas corpus*.

But, as stated, that is not this case. Here the insanity is shown on the face of the record, and the contention is that where it does so appear on the face of the record, it completely negatives the commission of a crime, and so disentitles, on the face of the record, the demanding State to a surrender of the alleged fugitive.

It is not without significance that diligent counsel have been able to find but one other case in which an attempt has been made to extradite a lunatic for escaping from a madhouse, and this is a case in which the courts of the State of New York itself declined upon the demand of Massachusetts to return an escaped lunatic upon extradition process, and released the lunatic upon *habeas corpus*. [Record, Opinion of the Court, p. 237.]

PART II.—THE POINTS OF LAW INVOLVED WITH THE AUTHORITIES RELIED UPON IN SUPPORT OF EACH POINT.

Points of Law.

Point I.—Extradition, or Interstate Rendition, Will Lie Only for "Crimes," and This Includes Misdemeanors, and an Act to Constitute a Crime or Misdemeanor Must Contain the Elements and Satisfy the Requirements That Are Essential to Constitute Crimes or Misdemeanors at Common Law. The Power of a State to Create Extraditable Crimes is Subject to This Limitation.

The Constitution of the United States says:

> "A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime." (Art. 4, sec. 2.)

Blackstone in his Commentaries [Book IV, ch. 1, p. 5] says:

> "A crime or misdemeanor is an act committed or omitted, in violation of a public law either forbidding or commanding it. This general definition comprehends both crimes and misdemeanors, which, properly speaking, are mere synonymous terms; though, in common usage, the word 'crimes' is made to denote such offenses as are of a deeper and more atrocious dye; while smaller faults, and omissions of less consequence, are comprised under the gentler names of 'misdemeanors' only."

In construing terms of art in the Constitution we are to look at the meaning which those terms had at common law, both in the United States and England, at the time of the adoption of the Constitution.

This has been the settled policy of the Supreme Court from the beginning, and has been declared time and time again.

In United States *vs.* Wilson (1833), 7 Peters, 160 [in which the court examined the pardon power of the National Executive], Mr. Chief Justice Marshall said:

> "The Constitution gives to the President in general terms, 'the power to grant reprieves and pardons for offenses against the United States.'
>
> "As this power had been exercised, from time immemorial, by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it."

In Thompson *vs.* Utah [(1898), 170 U. S., 343 (a case involving the right of the State to provide a jury fewer in number than twelve)], Mr. Justice Harlan said:

> "It must consequently be taken that the word 'jury' and the words 'trial by jury' were placed in the Constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument;"

In *Ex parte* Bain [(1887), 121 U. S., 1 (a case regarding the necessity for a "presentment or indictment of the grand jury as provided by the Fifth Amendment")] Mr. Justice Miller, delivering the opinion of the court, said:

> "It is never to be forgotten that, in the construction of the language of the Constitution here relied on, as

> indeed in all other instances where construction becomes necessary, we are to place ourselves as nearly as possible in the condition of the men who framed that instrument. Undoubtedly the framers of this article had for a long time been absorbed in considering the arbitrary encroachments of the crown on the liberty of the subject, and were imbued with the common-law estimate of the value of the grand jury as part of its system of criminal jurisprudence. They, therefore, must be understood to have used the language which they did in declaring that no person should be called to answer for any capital or otherwise infamous crime, except upon an indictment or presentment of a grand jury, in the full sense of its necessity and of its value."

In West *vs.* Gammon [(1899), 98 Fed., 426-427] Day, circuit judge, in discussing an alleged violation of the Sixth Amendment, said:

> "This amendment to the Constitution must be construed with reference to the common-law right of jury trial as the same existed at the time of its adoption as part of the Federal Constitution."

The courts have looked to the common law of England as it existed at the time of the adoption of the Constitution in determining the meaning of "*ex post facto*" [Carpenter *vs.* Pennsylvania (1854), 17 How., 456, and a number of other cases]; "pardon" [United States *vs.* Wilson (1833), 7 Peters, 160; United States *vs.* Harris (1866), 26 Fed. Cases, No. 15315]; "right to be informed of the nature and cause of the accusation" (Sixth Amendment) [United States *vs.* Potter, (1892), 56 Fed., 83]; "crimes" (Art. III and Sixth Amendment) [Callan *vs.* Wilson (1888), 127 U. S., 540]; "trial * * * by jury" (Art. III, Amendments 6 and 7) [Callan *vs.* Wilson, *supra;* Thompson *vs.* Utah (1898), 170 U. S., 343]; "twice put in jeopardy" (Fifth Amendment). [United States *vs.* Three Copper Stills (1890), 47 Fed., 495, and see United States *vs.* Gilbert (1834), 25 Fed. Cases, No.

15204]; "jury of the State and district wherein the crime shall have been committed" (Sixth Amendment) [United States *vs.* Ayres (1891), 46 Fed., 651], as these terms and phrases are used in the Constitution.

It is to be noted that a distinction ought to be drawn under the cases between the right of a State to establish new crimes, that is, make acts criminal which were not theretofore criminal—an undoubted right of the State—and the absence of a right in the State to change, in matters of interstate rendition, the essential elements which characterize crimes and misdemeanors. That is to say, under the Federal Constitution a State might make standing on the street corner a crime, but a State may not, for example, say that it is not necessary in order to constitute the crime specified for the party committing it to possess what is termed a *mens rea*, or any mind at all, and then successfully demand the rendition of a person alleged to be a fugitive from justice on account of such an alleged crime, where the papers showed that the alleged fugitive was *non compos mentis*.

Acts denominated by States as crimes and misdemeanors for the commission of which extradition is requested must, under our Federal Constitution, possess the elements and satisfy the requirements that are essential to constitute crimes and misdemeanors at common law; otherwise extradition may not be granted. This is the check which the Federal Government has over fantastic State legislation.

Point II.—In Interstate Rendition the Papers of the Demanding State Should Show, "by Competent Proof, That the Accused is Substantially Charged with Crime against the Laws of the Demanding State," That is, the Papers Must Charge a Crime and Must Make Out a Prima Facie Case against the Accused in Respect to the Crime Charged; Otherwise the Rendition of the Fugitive Must Fail.

Mr. Justice Matthews, in delivering the unanimous opinion of the court in Roberts *vs.* Reilly [(1885), 116 U. S., 80, 95], upon a consideration of certain questions raised in an interstate rendition case, said:

> "It must appear, therefore, to the governor of the State to whom such demand is presented, before he can lawfully comply with it, first, that the person demanded is substantially charged with a crime against the laws of the State from whose justice he is alleged to have fled, by an indictment or an affidavit, certified as authentic by the governor of the State making the demand; and, second, that the person demanded is a fugitive from the justice of the State the executive authority of which makes the demand."
>
> "The first of these prerequisites is a question of law, and is always open upon the face of the papers to judicial inquiry, on an application for a discharge under a writ of *habeas corpus*. The second is a question of fact, which the governor of the State upon whom the demand is made must decide, upon such evidence as he may deem satisfactory."

This language was quoted and approved by the Supreme Court in Hyatt *vs.* Corkran [(1902), 188 U. S., 691, 709], and in Appleyard *vs.* Massachusetts [(1906), 203 U. S., 222, 228].

The doctrine of this point, while not directly affirmed, was yet distinctly recognized by this court in the recent case of Pierce *vs.* Creecy [(1908), 210 U. S., 387], which involved an application for release from custody under *habeas*

corpus by one demanded in interstate rendition. Mr. Justice Moody, speaking for the whole court, said:

> "The counsel for the petitioner disclaim the purpose of attacking the indictment as a criminal pleading, appreciating correctly that the point here is not whether the indictment is good enough, over seasonable challenge, to bring the accused to the bar for trial. Counsel concede that they cannot successfully attack the indictment except by showing that it does not charge a crime. The distinction between these two kinds of attack, though narrow, is clear. But it will not do to disclaim the right to attack the indictment as a criminal pleading and then proceed to deny that it constitutes a charge of crime for reasons that are apt only to destroy its validity as a criminal pleading. There must be objections which reach deeper into the indictment than these which would be good against it in the court where it is pending." (P. 401.)
>
> * * * * * * *
>
> "But it is obvious that an objection which, if well founded, would destroy the sufficiency of the indictment, as a criminal pleading, might conceivably go far enough to destroy also its sufficiency as a charge of crime." (P. 404.)

The contention made by the appellee here is precisely the contention referred to by the court in the Pierce case, namely, that the indictment does not on its face charge a crime. The court has clearly intimated it will on *habeas corpus* discharge, as indeed it is submitted it must discharge, any person who is sought to be returned under such a fatally defective indictment.

Point III.—Whether or Not a Crime Has Been Charged Within the Foregoing Rule and a Prima Facie Case Duly and Properly Made Out Will be Examined Into on Habeas Corpus in Cases of Interstate Rendition.

It is the settled law that, in interstate rendition—

> "The person demanded has no constitutional right to be heard before the Governor on either question, [that is 'whether the person charged has been substantially charged with a crime, and whether he is a fugitive from justice'], and the statute provides for none." [Munsey *vs.* Clough (1904), 196 U. S., 364, 372.]

Accordingly, the announced doctrine of this court, that a person for whose delivery in interstate rendition a warrant has issued by the executive of a State "is entitled to invoke the judgment of the judicial tribunals, whether of the State or the United States, by the writ of *habeas corpus*, upon the lawfulness of his arrest and imprisonment" [Roberts *vs.* Reilly (1885), 116 U. S., 80, 94], is most important.

Under these principles the writ of *habeas corpus* and the proceedings thereunder become the only protection which an alleged fugitive has against unfounded and even fraudulent rendition proceedings. Therefore these proceedings become of vital value to the liberty of every American citizen. As Judge Hughes said in *Ex parte* Slauson [(1896), 73 Fed., 666]:

> "The laws provide for no hearing to the alleged fugitive before the executive of the two States, and seem to recognize the fact that he has no redress except in this writ of high privilege,—this writ of *habeas corpus.*"

While agreeing wholly with Mr. Justice Harlan that "the judicial authorities of the Union should equally take care that the provisions of the Constitution be not so narrowly

interpreted as to enable offenders against the laws of a State to find a permanent asylum in the territory of another State," it is essential that the earlier part of this same declaration be kept equally in mind, to wit: that "a State should take care, within the limits of the law, that the rights of its people are protected against illegal action." [Appleyard *vs.* Massachusetts (1906), 203 U. S., 222, 228; quoted in McNichols *vs.* Pease (1907), 207 U. S., 100, 112.]

Mr. Justice Harlan, in Robb *vs.* Connolly [(1884), 111 U. S., 624, 638], having raised a question whether an arrest of an alleged fugitive without certain specified formalities would be in accordance with law, continued as follows:

> "This question could not be answered in the affirmative, except upon the supposition, not to be indulged, that, so far as the constitution and the legislation of Congress are concerned, the transporting of a person beyond the limits of a State in which he resides, or in which he happens to be, to another State, depends entirely upon the arbitrary will of the executive authorities of the State demanding and of the State surrendering him."

As Judge Dillon remarked in *In re* Buell [(1875), 4 Fed. Cas. No. 2102], when speaking of rendition between the District of Columbia and some Federal district, and of the duty of the district judge, in cases specified, "seasonably to issue, and the marshal to execute, a warrant for his removal to the district where the trial is to be had,"—

> "This provision devolves on a high judicial officer of the government a useful and important duty. In a country of such vast extent as ours, it is no light matter to arrest a supposed offender, and, on the mere order of an inferior magistrate, remove him hundreds, it may be thousands, of miles for trial. The law wisely requires the previous sanction of the district judge to such a removal. Mere technical defects in an indictment should not be regarded; but a district judge who should order the removal of a prisoner when the only probable cause relied on or shown was

> an indictment, and that indictment failed to show any offense against the laws of the United States, or showed an offense not committed or triable in the district to which the removal is sought, would misconceive his duty and fail to protect the liberty of the citizens."

In this connection it should be observed that Judge Dillon later declared:

> "It is a fundamental doctrine in English and American law that there can be no constructive offenses; that before a man can be punished his case must be clearly within the law; the charge is to be unmistakably set forth in the indictment, and if there be uncertainty or fair doubt whether the law embraces the act, or the indictment sufficiently charges the offense, the doubt is to be resolved in favor of the accused. U. S. *vs.* Morris, 14 Pet. [39 U. S.] 464; U. S. *vs.* Wiltberger, 5 Wheat. [18 U. S.] 76."

In United States *vs.* Hess [(1883), 124 U. S., 483, 486, 488] Mr. Justice Field laid down in the clearest way the essentials of an indictment. He said:

> "The statute upon which the indictment is founded only describes the general nature of the offense prohibited; and the indictment, in repeating its language without averments disclosing the particulars of the alleged offense, states no matters upon which issue could be formed for submission to a jury. The general, and, with few exceptions, of which the present case is not one, the universal rule, on this subject, is, that all the material facts and circumstances embraced in the definition of the offense must be stated, or the indictment will be defective. No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment, or implication, and the charge must be made directly and not inferentially, or by way of recital."

Mr. Justice Field concluded his opinion with the following words:

> "Following this rule, it must be held that the second count of the indictment before us does not sufficiently describe an offense within the statute. The essential requirements, indeed, all the particulars constituting the offense of devising a scheme to defraud, are wanting. Such particulars are matters of substance and not of form, and their omission is not aided or cured by the verdict."

An offense alleged to have been committed by an adjudged lunatic is not legally described as an offense unless it is alleged that he was sane enough to recognize its wrongful nature at the time the offense was committed.

The following cases will suggest the range of inquiry taken by courts upon writs of *habeas corpus* in interstate rendition proceedings.

In re Buell, *supra*, Judge Dillon examined into the sufficiency of an indictment, and finding it insufficient because of uncertainty as to the publication of the libel as to which it was issued, discharged the prisoner. On a second arrest the prisoner was again discharged on *habeas corpus*, the judge finding "that the indictment was found by a grand jury of a court having no jurisdiction of the offense." [See note to *In re* Buell, *supra*.]

In United States *vs.* Fowkes [(1892), 49 Fed., 50] Judge Butler investigated the circumstances surrounding the finding of an indictment and said:

> "Without regard, however, to the circumstances under which indictments are found, the courts will go behind them whenever it appears that the relator's safety from unjust imprisonment requires it. The right to personal liberty is too important to be overborne by anything short of evidence that it has been forfeited. Mere matters of form, and considerations based on notions of comity between courts, have no proper place in trials on *habeas corpus*. In the case of United States *v.* Rogers, 23 Fed. Rep., 658, and

> *In re* Buell, 3 Dill, 116, the court went behind the indictment to ascertain whether an offense had been committed within the jurisdiction where it was found, as therein charged, and numerous similar cases might be cited. *In re* Mohr, *supra;* Hartman *v.* Aveline, 63 Ind., 344; Wilcox *v.* Nolze, *supra;* and Jones *v.* Leonard, *supra*, the court went behind the governor's hearing and warrant of extradition, and inquired whether there was evidence to show that the crime charged had been committed where the indictment (on which the warrant issued) was found, as it averred. The court will not, of course, hear the relator's defense and try the case; it requires simply to be satisfied that there is evidence on which a jury may convict. In the case before me there is no evidence whatever produced on which a jury could proceed, notwithstanding the fact that the circumstances shown call for its production if any exist."

This was affirmed by the Circuit Court of Appeals for the Third District in 53 Fed., 13.

In *Ex parte* Slauson [(1896), 73 Fed., 666] Judge Hughes investigated upon *habeas corpus* a charge of "fraudulent appropriation of money," and reached the conclusion that the facts set forth did not establish the crime. He also investigated the conduct of the party instigating the rendition proceedings, and closed his opinion with these words:

> "Comment upon his conduct is unnecessary. His charge of fraud against Slauson is an afterthought. The affidavit by which he charged the fraud is a flagrant perjury. His prosecution of this extradition proceeding is malicious. The governor of Tennessee was deceived, and the requisition which he issued for Slauson was improvidently granted. The governor of Virginia was not advised of, and had no means of testing the truth of, the allegations of the requisition; but, in performing his duty in issuing his warrant directing the arrest of Slauson, he took care to reserve to him in advance the privilege of the writ of *habeas corpus*, under which he is now before me.

"I have thus dealt with the facts in the case. The prisoner ought to be discharged on technical grounds also. The law in such proceedings requires that the charge shall be substantially set forth in the papers filed. In these papers there is no crime substantially set forth. There is merely a reference to a criminal statute, itself not identified by the reference. Merely to refer to a class of criminal acts is not to charge a specific crime. This is all that has been done in this affidavit. Nor does the affidavit set out important elements of this statutory offense. The warrant is vague, and does not inform the prisoner of the character of the crime, nor the time, place, or circumstances of its commission, of which every prisoner is entitled to be advised." [See however as to a limitation upon this action of the court under such a writ, the words of Mr. Justice Harlan, in Pettibone *vs.* Nichols (1906), 203 U. S., 192, 203: "We pass by, both as immaterial and inappropriate, any consideration of the motives that induced the action of the governor of Colorado (the surrendering State). This court will not inquire as to the motives which guided the Chief Magistrate of a State when executing the functions of his office."]

The accused in this case has therefore the constitutional right to demand that this court shall consider and pass upon the question whether or not he has in this proceeding been charged with a crime within the meaning of the Constitution, whether in this respect a *prima facie* case is made out against him. The indictment submitted must present such a charge and such a case, and if it fail in any substantial respect the accused is entitled to his release. It is his clear constitutional right to avail himself of every substantial defect in the papers. This is not a matter of aid to criminals. It is a safeguard to the liberty of the citizen. A State seeking to secure the return of an alleged fugitive to its jurisdiction for trial on a criminal charge, must show proper grounds for its request; otherwise the citizen has not security.

Point IV.—The Sine Qua Non of All Crimes and Misdemeanors at Law is a Criminal Intent.

As Blackstone put it (Book IV, chap. 2, p. 20):

> "All the several pleas and excuses which protect the committer of a forbidden act from the punishment which is otherwise annexed thereto may be reduced to this single consideration, the want or defect of *will*. An involuntary act, as it has no claim to merit, so neither can it induce any guilt; the concurrence of the will, when it has its choice to do or to avoid the fact in question, being the only thing that renders human actions either praiseworthy or culpable. Indeed, to make a complete crime cognizable by human laws, there must be both a will and an act. For, though, *in foro conscientiæ*, a fixed design or will to do an unlawful act is almost as heinous as the commission of it, yet, as no temporal tribunal can search the heart or fathom the intentions of the mind, otherwise than as they are demonstrated by outward actions, it therefore cannot punish for what it cannot know. For which reason, in all temporal jurisdictions, an *overt* act, or some open evidence of an intended crime, is necessary, in order to demonstrate the depravity of the will, before the man is liable for punishment. And, as a vicious will without a vicious act is no civil crime, so, on the other hand, an unwarrantable act without a vicious will is no crime at all. So that, to constitute a crime against human laws, there must be, first, a vicious will; and, secondly, an unlawful act consequent upon such vicious will."

Bishop in his New Criminal Law (vol. I) makes, as to this principle, the following statements:

> "SECTION 206. It results from the foregoing, and the authorities establish the rule, that an act and an evil intent must combine to constitute in law a crime.
>
> "SECTION 430. It has already been explained that only by a combination of an act and intent is crime constituted. No amount of intent alone, or of act alone, is sufficient; the two must combine."

And the Supreme Court, through Mr. Justice Harlan, in a very elaborate opinion covering questions of intent and sanity [Davis *vs.* U. S. (1895), 160 U. S., 469-84], made the following declaration:

> "No one, we assume, would wish either the courts or juries when trying a case of murder to disregard the humane principle, existing at common law and recognized in all cases tending to support the charge of the court below, that, 'to make a complete crime cognizable by human laws, there must be both a will and an act'; and 'as a vicious will without a vicious act is no civil crime, so, on the other hand, an unwarrantable act without a vicious will is no crime at all. So that to constitute a crime against human laws, there must be, first, a vicious will; and, secondly, an unlawful act consequent upon such vicious will.' 4 Bl. Com. 21. * * *
>
> "Neither in the adjudged cases nor in the elementary treatises upon criminal law is there to be found any dissent from these general propositions." [See United States *vs.* Gooding (1827), 12 Wheaton, 460; United States *vs.* Simmons (1878), 96 U. S., 360; United States *vs.* Hess (1888), 124 U. S., 483.]

The rule in New York is in entire accord with that so announced.

In Stokes *vs.* People [(1873), 53 N. Y., 164-179], Grover, judge, in discussing the question of intent in connection with an indictment for murder, said:

> "To constitute crime there must not only be the act, but also the criminal intention, and these must concur, the latter being equally essential with the former. *Actus non reum facit, sed mens* is a maxim of the common law."

This language was cited and approved in People *vs.* Powell [(1875), 63 N. Y., 88-91], in which case Andrews, judge, in discussing what constituted the crime of conspiracy in connection with the prosecution for such an offense, said:

> "The general rule is, that to constitute crime there must not only be the act but also the criminal intention; and these must concur, the latter being equally essential with the former" [Grover, judge, in Stokes *vs.* People, 53 N. Y., 179].

In Martin *vs.* Goldstein [(1897), 46 N. Y. Supplement, 961-64] the appellate division of the Supreme Court of New York, in discussing a prosecution for a misdemeanor [it is a misdemeanor which is charged in the case at bar], made the following declaration as to the intention and the necessity of an intent in order that there might be a crime:

> "Now, it is elementary that, to constitute a crime, there must be not only the act itself, but a criminal intent must also accompany the act. *Stokes vs. People*, 52 N. Y., 164-179; *People vs. Powell*, 63 N. Y., 88-91. And yet, in order to give this section the construction claimed for it by the defendant's counsel, we must hold that the legislature has not only utterly ignored this elementary principle, but, in violation thereof, has declared that while in the case specified malice or intent must exist in order to constitute the crime of procuring a process to be served on Saturday, or of procuring a civil action to be adjourned to that day, the crime of serving a process which is returnable on Saturday may be committed without any intent accompanying the act. This proposition, it seems to us, has only to be stated, to render its absurdity manifest;"

In cases of conspiracy such as this the gist of the crime is the intent. [See the Law of Conspiracy and Crimes, by Wright, Carson's edition, page 6.] Bishop, in his New Criminal Law (vol. 2, p. 171), says:

> "The conspiracy is the corrupt agreeing together of two or more persons to do, by concerted action, something unlawful either as a means or an end."

That is, the agreement is the intent which is the distinguishing characteristic.

Point V.—Insane Persons Are Incapable of Entertaining a Criminal Intent, and Therefore Incapable of Committing a Crime.

The early authorities leave no doubt on this point. In Hawkins' Pleas of the Crown [chap. 1, sec. 1] it is declared:

> "As to the first point [want of reason], it is to be observed, that those who are under a natural disability of distinguishing between good and evil, as infants under the age of discretion, idiots, and lunatics, are not punishable by any criminal prosecution whatsoever."

Hale, in his Pleas of the Crown [pt. 1, chap. 1], declares:

> "Man is naturally endowed with these two great faculties, understanding and liberty of will, and therefore is a subject properly capable of a law properly so called, and consequently obnoxious to guilt and punishment for the violation of that law, which in respect of those two great faculties he hath a capacity to obey: The consent of the will is that, which renders human actions either commendable or culpable; as where there is no law, there is no transgression, so regularly where there is no will to commit an offense, there can be no transgression, or just reason to incur the penalty or sanction of that law instituted for the punishment of crimes and offenses. And because the liberty or choice of the will presupposeth an act of the understanding to know the thing or action chosen by the will, it follows that, where there is a total defect of the understanding; there is no free act of the will in the choice of things or actions."

This principle applies, says Hale, in "cases of crimes and misdemeanors."

Bishop, in his New Criminal Law (vol. I, sec. 396*a*), says:

> "This chapter, like the others connected with it, pertains to the criminal intent. As without this intent there is no crime, so there can be no criminal intent without the mental capacity for it. The lack of such mental capacity is termed insanity."

Again, the same author, in section 375, paragraph 1, says:

> "Since a criminal intent is an indispensable act in every crime, a person mentally incapable of entertaining such intent, cannot incur legal guilt."

So far as this case is concerned, the penal law of New York puts the matter beyond all dispute. Section 1120 of the Penal Law provides as follows:

> "An act done by a person who is an idiot, imbecile, lunatic or insane, is not a crime."

From all of which it results that there can be no intent where there is no mind, and there is no mind where the person is insane.

CONCLUSION.

An indictment and accompanying paper which, on their face, show that the person accused of committing the crime charged is an avowed and adjudged lunatic, who as a matter of law is not criminally responsible, are fatally and substantially defective in interstate rendition proceedings, because they fail to charge a crime within the meading of the Federal Constitution; and the person so charged is entitled to be set free from any and every custody based upon such insufficient and substantially defective process.

P. C. KNOX,
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MEMORANDUM.

Parens Patriæ.

With reference to the power having its source in the doctrine of *parens patriæ*, it may in the first place be observed that it appears from the decisions of the Supreme Court that this power, so far as the present case is concerned, vests in the individual States or in their legislatures, seemingly in the legislature. Mr. Justice Bradley, speaking for a majority of the court in the "Mormon Church" case (136 U. S., 1), said regarding the doctrine of *parens patriæ:*

> "In Fontain *vs.* Ravenel, 58 U. S., —; 17 How., 369, 384 [15:80, 86], Mr. Justice McLean, delivering the opinion of this court in a charity case, said: 'When this country achieved its independence, the prerogatives of the crown devolved upon the people of the States. And this power still remains with them except so far as they have delegated a portion of it to the federal government. The sovereign will is made known to us by legislative enactments. The State as a sovereign, is the *parens patriæ*.
>
> "This prerogative of *parens patriæ* is inherent in the supreme power of every state, whether that power is lodged in a royal person or in the legislature, and has no affinity to those arbitrary powers which are sometimes exerted by irresponsible monarchs to the great detriment of the people and the destruction of their liberties. On the contrary, it is a most beneficent function, and often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who can not protect themselves. Lord Chancellor Somers, in Cary *vs.* Bertie, 2 Vern. 333, 342, said: 'It is true infants are always favored. In this court there are several things which belong to the King as *pater patriæ*, and fall under the care and direction of this court, as charities, infants, idiots, lunatics, etc.'
>
> "The Supreme Judicial Court of Massachusetts well said, in Sohier *vs.* Massachusetts Gen. Hospital,

3 Cush., 483, 497: 'It is deemed indispensable that there should be a power in the legislature to authorize a sale of the estates of infants, idiots, insane persons and persons not known, or not in being, who cannot act for themselves. The best interest of these persons, and justice to other persons, often require that such sales should be made. It would be attended with incalculable mischiefs, injuries and losses, if estates, in which persons are interested who have not capacity to act for themselves, or who cannot be certainly ascertained, or are not in being, could, under no circumstances, be sold, and perfect titles effected. But, in such cases, the legislature, as *parens patriæ*, can disentangle and unfetter the estates, by authorizing a sale, taking precaution that the substantial rights of all parties are protected and secured.'

"These remarks in reference to infants, insane persons and persons not known, or not in being, apply to the beneficiaries of charities, who are often incapable of vindicating their rights, and justly look for protection to the sovereign authority, acting as *parens patriæ*. They show that this beneficent function has not ceased to exist under the change of government from a monarchy to a republic; but that it now resides in the legislative department, ready to be called into exercise whenever required for the purposes of justice and right, and is as clearly capable of being exercised in cases of charities as in any other cases whatever."

The question, however, is,—What is this power so derived from *parens patriæ*, and for what purposes and in what way should it be exercised?

The question will be sufficiently answered, with reference to the present inquiry as to lunatics, by the following extracts from early and modern commentators on English law and from judicial utterances in adjudged cases.

Fitz-Herbert, in his great work Natura Brevium, written in 1514, says, folio 232 [see English translation New Natura Brevium, 9th edition, 1794]:

"*Writ de idiota inquirendo & examinando.*

"Note, that the king by the law, of right, is to defend his subjects, their goods and chattels, lands and tenements; and therefore in the law every loyal subject is taken into the king's protection; and if he be put out of the king's protection for his offence, then every man may do to him as against the king's enemy, and he hath no remedy for the same by the king's law. And because every man is within the king's protection, an idiot, who cannot defend or govern himself, nor order his lands, tenements, goods or chattels, the king of right ought to have in his custody, and to rule him and his lands and tenements, goods and chattels; and that appeareth by the statute of *Prærogativa Regis*, cap. 8."

Origin of the power over lunatics.—There has been some disagreement as to the origin of this *parens patriæ* power over lunatics. Coke in his Institutes [part II, p. 14], published in 1628, discussed the question as follows:

"But then it is demanded, when was this prerogative given to the king? Certain it is, that the king had it before statute of 17 E. 2, *de prærogativa regis*, for it appeareth in our books, that the king had this prerogative, *anno* 3 *E.* 2. And before that, it is manifest that the king had it before Britton wrote in the reign of E. 1, as you may read in his book.

"And it is as clear, that when Bracton wrote (who wrote about the end of the reign of H. 3, that the king had not then this prerogative.

"And therefore it followeth, that this prerogative was given to the king E. 1, before that Britton wrote, by some act of parliament, which is not now extant. And it appeareth by the Mirror of Justices agreeing with Fleta, that this prerogative was granted by common assent, *vide* lib. 4. Beverley's case, fol. 126."

It will be observed that reference is here made to Beverley's case (decided in 1603). In his note on that case [4 Coke's Rep'ts, 123*b*, 124*a*], Coke asserted that the king held these powers by the common law and that the statutes

(shortly to be referred to) were merely declaratory of the common law.

The courts seem generally to have taken this latter view of Lord Coke as correctly stating the origin of the power.

In Pope's work on the law of lunacy [Boome & Fowke's edition], in connection with the prerogative of the Crown, he says:

> "Though the jurisdiction in lunacy as at present exercised is almost entirely the creature of statute, it is in its origin due to the delegation by the Crown of the interest which it takes by virtue of its prerogative in the estates of lunatics duly found to be so, and of the trusts to which that interest is subject. This prerogative, whatever its date—and though Staundforde places it in Edward I's reign [citing St. Pr. Reg. 33], it was probably earlier [citing Bracton de Leg. f. 421; Fleta Bk. 6, 240; Mem. Scacc. Trin. 19 Edw. I; Pasch. 20 Edw. I; Trin. 23 Edw. I; Att'y Gen'l. *vs.* Marquis of Ailesbury, 12 App. Cases, 692]—was definitely stated in the Statute of Prerogatives of 17 Edw. 2, the 9th chapter of which relates to idiots, the 10th to lunatics [p. 25]." * * *

But whatever the origin of the *parens patriæ* power *vis a vis* lunatics, the statute of 17 Ed. 2, ch. 10 [1324], is of interest as defining the extent of that power. It reads:

> "Also the king shall provide, when any (that beforetime hath had his wit and memory) happen to fail of his wit, as there are many *per lucida intervalla*, that their lands and tenements shall be safely kept without waste and destruction, and that they and their household shall live and be maintained competently with the profits of the same, and the residue besides their sustentation shall be kept to their use, to be delivered unto them when they come to right mind; so that such lands and tenements shall in no wise be aliened; and the king shall take nothing to his own use. And if the party die in such estate, then the residue shall be distributed for his soul by the advice of the ordinary." (1 Pickering's Statutes, p. 380.)

The following points are worthy of notice in connection with this statute:

(1) It applies, as Pope points, only to lands and tenements; nothing is said about goods and chattels.

(2) The king shall provide that the lunatic and his household "shall live and be maintained competently."

(3) Nothing is said about the *custody* of lunatics, and the strong implication is that the lunatic is with his "household," for the provision is "that *they* and *their household*" shall be so kept.

That is to say, the whole statute looks to the protection of the lunatic's estate and to his sustenance, for, as Fonblauque says: "The preservation of every private man's goods in particular is the preservation of the Commonwealth in general." [Treatise on Equity, vol. II, p. 207.] The manual *custody* and *control* of the lunatic was not provided for.

It is, however, clear that prior to 1714, at which time Parliament passed a further statute in this matter, the chancellor, acting either under special royal authority [see Lord Thurlow in *Wigg vs. Tiller* (1779), Dick., 522, and *Murray vs. Frank* (1779), Dick., 555], or under his general authority as chancellor [see *The Bailiffs and Burgesses, etc., vs. Lenthale et al.* (1735), 2 Atkyns, 551], did examine lunatics and commit their persons to caretakers. [*Lady Mary Cope's Case* (1677), 2 Chan. Cases, 239; *Foster vs. Merchant* (1684), 1 Eq. Cas. Abr., 277; S. C., 1 Vern., 262; *Audley vs. Audley* (1690), Dick., 16; S. C., 1 Eq. Cas. Abr., 277; 2 Vernon, 192; *Dormer's Case* (1714), 1 P. Wms., 263; *Lord Wenman's Case* (1721), 1 P. Wms., 702; *Neal's Case* (1729), 2 P. Wms., 545; *Ex parte* Ludlow (1731), 2 P. Wms., 635; *Francis Sheldon, Esq., vs. Mr. Justice Fortescue Aland & al.* (1731), 3 P. Wms., 104]. No statute authorizing this procedure has been found.

There are, however, certain expressions of the courts going to show that in providing custodians for lunatics the relatives were preferred over non relatives. [*Dormer's Case, supra*, custody to uncle; *Lord Wenman's Case, supra*, custody

to wife; *Neal's Case, supra,* custody to sisters; *Ex parte Ludlow, supra,* custody to second cousin; *Ex parte Billinghurst* (1750), Amb. 104, custody to brother.] In the *Ludlow, Neale,* and *Billinghurst* cases the question of granting custody to the next of kin was raised and disposed of in favor of kin as against stranger.

Indeed, in *Lord Wenman's Case,* Lord Hardwicke said: "* * * for if he [Lord Wenman] were found so [a lunatic], his wife must have the commitment of his person, and also an allowance made her suitable to the estate and greatness of his quality," and in discussing guardianship in socage and the question of the property of the lunatic, his lordship, in *Dormer's Case,* dismissed the question of the custody of the lunatic's person with these words: "I found this order made for the commitment of the custody of the estate to Mr. Justice Dormer, and of the person to Sir Robert Jenkinson, whom I take to be a nominal person for Mr. Justice Dormer [the uncle of the lunatick] and that the person of the lunatick has in fact been all along with Mr. Justice Dormer;" * * *

In other words, in the early law the primarily essential thing was the protection of the lunatic's property, because, to quote Fonblanque again, "The preservation of every man's private goods in particular is the preservation of the commonwealth in general," which is the very basis of the *parens patriæ* power; and, secondly, because in the first place the king is to provide "that he who wants reason shall not alien his lands, nor waste his goods," and because in the next place the support of the lunatic was to come from his own estate, and to this end the jurisdiction of the chancellor was exercised. As Lord Hardwicke said in *Ex parte* Marchioness of Annandale [(1749), Amb. 80], "In cases of lunacy, the first care of the court is the maintenance of the lunatic, * * *." This was accomplished under 17 Edw. II, (1) by assuming charge of the lunatic's property through a committee, and (2) by providing for the support of the lunatic from such property. It must be, so far as can

be judged from the statutes and the cases, that whatever the control and disposition of the custody of the lunatic's person was in the early law, it was a development of and an incident to the support of the lunatic and his household from his own estate, "for the king has not any interest in the lunatic" [Coke's notes to Beverley's Case], "the king is a mere trustee." [Lord Redesdale in Matter of Fitzgerald (1805), 2 Sch. & Sef., 431, 435.]

This seems to have been the status of the law when in 1744 Parliament found it necessary to provide for more effective control of dangerous lunatics, such control to be exercised by the State within certain exceptions. These new provisions and powers, however, do not relate, and do not purport to relate, to matters of royal prerogative, to the *parens patriæ* power of the king. The new stipulation and powers do not have their origin or sanction in such royal power. These are the result of the exercise by the Parliament of its ordinary powers of police of providing for the safety of the subjects of the realm.

This statute, enacted in 1744, was an ordinary criminal statute and related to the punishment of "rogues, vagabonds, and other idle and disorderly persons." Its provisions regarding lunatics read:

> "An act to amend and make more effectual the laws relating to rogues, vagabonds, and other idle and disorderly persons, and to houses of correction. (Pickbrings' Statutes, vol. XVIII, p. 156.)
>
> * * * * * * *
>
> "*XX. And whereas there are sometimes persons, who by lunacy, or otherwise, are furiously mad, or* **are so far disordered in their senses that they may** *be dangerous to be permitted to go abroad;* be it therefore enacted by the authority aforesaid, That it shall and may be lawful for any two or more justices of the peace, where such lunatic or mad person shall be found, by warrant under their hands and seals, directed to the constables, church wardens and overseers of the poor of the parish, town or place, or some

of them, to cause such person so to be apprehended, and kept safely locked up in some secure place, within the county or precinct, where such parish, town or place shall lie, as such justices shall under their hands and seals direct and appoint; and (if such justices find it necessary) to be there chained, if the last legal settlement of such person shall be in any parish, town or place within such county or precinct; and if such settlement shall not be there, then such person shall be sent to the place of his or her last legal settlement by a pass, *mutatis mutandis*, as aforesaid, and shall be locked up or chained, by warrant of two justices of the county or precinct to which such person is so sent, in manner aforesaid; and the reasonable charges of removing, and of keeping, maintaining and curing such person during such restraint (which shall be for and during such time only as such lunacy or madness shall continue) shall be satisfied and paid (such charges being first proved upon oath) by order of two or more justices of the peace, directing the church wardens or overseers where any goods, chattels, lands or tenements of such person shall be, to seize and sell so much of the goods and chattels, or to receive so much of the annual rents of the lands and tenements, as is necessary to pay the same; and to account for what is so seized, sold or received, to the next quarter-sessions; but if such person hath not an estate to pay and satisfy the same, over and above what shall be sufficient to maintain his or her family, then such charges shall be satisfied and paid by the parish, town or place to which such person belongs, by order of two justices, directed to the church wardens or overseers for that purpose.

"XXI. *Provided always*, That this act, or anything therein contained, shall not extend, or be construed to extend, to restrain or abridge the prerogative of the King, or the power or authority of the lord chancellor, lord keeper or commissioners of the great seal of Great Britain for the time being, or the chancellor, or vice chancellor of the county palatine of Lancaster for the time being, or of the chamberlain or vice chamberlain of the county palatine of Chester for the time being; touching or concerning

such lunatics, or to restrain or prevent any friend or relation of such lunatics from taking them under their own care and protection; anything in this act contained to the contrary notwithstanding."

This statute is sufficiently explicit to need for present purposes no comment, further than to observe that it specifies that nothing in the act shall extend, or be construed to extend, "to restrain or prevent any friend or relation of such lunatics from taking them under their own care and protection."

Thus at that date, so far as dangerous lunatics were concerned, relatives certainly had prior rights as to custody over the state's officers, and seemingly over the King himself. Or, to put it differently, the *parens patriæ* power did not embrace the custody of the persons of dangerous lunatics, and the specific provisions of positive statute gave relatives prior rights over the state.

It seems quite clearly to follow from all the foregoing that the right to the custody of the person of dangerous lunatics is not derived from the *parens patriæ* power, and that, on the contrary, that power distinctly recognized such right in the relatives of such lunatic.

But it is to be observed, and this certainly is determinative of the whole present controversy, so far as it is bottomed on an assertion of the power, that the *parens patriæ* power is, under all the definitions, a relationship of subject or citizen and sovereign. It is only towards the subject or citizen that the sovereign can exercise a *parens patriæ* power, or can have and bear a *parens patriæ* relationship. A sovereign can bear no such relationship to aliens resident within his dominions. This is shown by the fact that the *parens patriæ* power of a sovereign is, so far as possible, extended to his subjects even when outside his own jurisdiction and while they are resident in foreign lands, for, as Lord Hardwicke declared in discussing the question of commissions *vis-à-vis* a British lunatic resident in France [*Ex parte* Southcate (1751),

Amb., 109], "As to the doubt on Thomas Southcate being abroad, it will be unreasonable, that the King's subject, being abroad, and a lunatic, should lose his protection." Therefore the relationship of subject or citizen and sovereign is the *sine qua non* of the exercise of the power *parens patriæ*.

In the present case the appellee is a citizen not of New York, now claiming over him a *parens patriæ* power, but of Pennsylvania. Therefore no *parens patriæ* power on the part of New York exists or can exist towards the appellee. All argument based upon or considerations originating in such power must therefore disappear from this case.

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IN THE

Supreme Court of the United States

No. 514 OCTOBER TERM, 1914.

HOLMAN A. DREW, Sheriff of Coos County, State of New Hampshire, Appellant,

vs.

HARRY KENDALL THAW, Appellee.

Appeal from the District Court of the United States for the District of New Hampshire.

BRIEF OF HARRY KENDALL THAW, Appellee.

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IN THE

Supreme Court of the United States

No. 514 OCTOBER TERM, 1914.

HOLMAN A. DREW, Sheriff of Coos County, State of New Hampshire, Appellant,

vs.

HARRY KENDALL THAW, Appellee.

Appeal from the District Court of the United States for the District of New Hampshire.

BRIEF OF HARRY KENDALL THAW, APPELLEE.

Abstract, or Statement of the Case.

The questions involved in this action arise upon a petition of Harry Kendall Thaw for his discharge upon a writ of *habeas corpus* from the custody of officers who were holding him upon an executive warrant issued by the governor of the State of New Hampshire, ordering his rendition to the State of New York upon requisition papers signed by the governor of the latter state.

The foundation of the request for Thaw's extradition is an indictment presented by the grand jury of New York County charging him with the crime of conspiracy to pervert justice and the due administration of law. (Record, p. 118.)

The indictment alleges that the crime was committed on or about the fourteenth day of August, 1913, and the venue is laid in the County of New York.

The facts set forth in the record and prior history of the case are, in brief, as follows:

On February 1, 1908, the petitioner was acquitted by a jury in the County and State of New York of the crime of homicide (p. 119). The verdict of acquittal was stated by the jury to be on the ground of insanity at the time of the commission of the act.

Section 454 of the Code of Criminal Procedure of the State of New York as published in Parker's New York Criminal and Penal Code Annotated, 1908, on page 139, provides as follows:

> "When the defense is insanity of the defendant, the jury must be instructed, if they acquit him on that ground, to state the facts with their verdict. The court must, thereupon, if the defendant be in custody, and they deem his discharge dangerous to the public peace or safety, order him to be committed to the state lunatic asylum, until he becomes sane" (p. 68).

Acting upon the authority of this section of the Criminal Code, Justice Dowling, who presided at Thaw's trial, without further proceedings or inquiry,

without notice or chance to defend against it, made the following order (p. 68):

> "The defendant on his trial in said indictment having been acquitted by the jury on the ground of insanity, and the court being certified of the fact, and the defendant being in custody, and the court deeming his discharge at this time dangerous to public safety, it is
>
> "Ordered that said Harry K. Thaw be detained in safe custody and be sent to the Matteawan State Hospital there to be kept in said hospital until thence discharged by due course of law.
>
> "It is Further Ordered that the Sheriff of the County of New York do forthwith convey said Harry K. Thaw to said hospital."

Thereupon the petitioner was committed to the Matteawan State Hospital for detention for an indefinite period of time and there remained in confinement, except for brief periods when he was elsewhere confined, during the pendency of legal proceedings instituted in the courts of New York to secure his release until the seventeenth day of August, 1913, when he escaped from that institution (p. 69). After his escape, he was first apprehended in Barford, Province of Quebec, Dominion of Canada, and subsequently deported back to the United States. He was again apprehended at Colebrook, Coos County, New Hampshire, on the tenth day of September, 1913 (p. 70). The foregoing facts are set forth in the petition for a writ of *habeas corpus* and are admitted by the failure of counsel for the State of New York to traverse the allegations.

Three sets of requisition papers have since issued from the Governor of the State of New York to the Gov-

ernor of the State of New Hampshire to secure Thaw's return to the former state. The several requisition papers bear dates as follows: September 12, 1913, October 24, 1913, and November 6, 1913 (pp. 75, 103, 115). The first set of requisition papers was founded on an information supported by affidavits charging the crime of conspiracy in the County of Dutchess, State of New York (p. 78). The second set of requisition papers was founded on an indictment returned in the County of New York, alleging the offense to have been committed in Dutchess County, New York (p. 103). The third set of requisition papers was founded on the same indictment but alleged the offense as having been committed in the County of New York (p. 115).

At the time of the commission of the alleged offence in New York County, the petitioner was confined in the Matteawan State Hospital in Dutchess County, an institution for the detention of the criminal insane under and by virtue of the original order of commitment made by Justice Dowling, above set forth (p. 107). Although several attempts had been made by Thaw to secure his release by writs of *habeas corpus,* no modification of the original order had ever been made (p. 107).

On the thirteenth day of September, 1913, Thaw presented a petition to the United States District Court for the State of New Hampshire for his discharge (p. 1), and on the eighth day of November, 1913, counsel for the State of New York filed a motion to dismiss the petition (p. 36).

On the eighteenth day of November, 1913, counsel for Thaw filed an amended petition setting forth the facts and circumstances that had transpired since the presentation of his first petition upon which no decision

had been made (p. 67). In the amended petition for a writ of *habeas corpus*, six grounds for Thaw's discharge are alleged, as follows (p. 71):

"That your petitioner alleges that he is unjustly detained of his liberty by the said Holman A. Drew, for the following reasons:

"First: Section 454 of the Code of Criminal Procedure of the State of New York, which provides that:

"'When the defense is insanity of the defendant the jury must be instructed, if they acquit him on that ground, to state the fact with their verdict. The court must, thereupon, if the defendant be in custody, and they deem his discharge dangerous to the public peace or safety, order him to be committed to the state lunatic asylum, until he becomes sane.'

is in conflict with the Sixth and Fourteenth Amendments to the Constitution of the United States, and is unconstitutional, and that said order of Justice Victor J. Dowling is null and void.

"Second: In neither of the three requisitions, or in the petitions to the Governor of the State of New York, or the information of the District Attorney of Dutchess County, or the information of the Attorney General of the State of New York, or the indictment found in the County of New York, is there a crime charged, as required by the Constitution of the United States and by Section 5278 of the Revised Statutes of the United States.

"Third: The requisition in its petition, affidavit and indictment, charges that a lunatic confined in an insane asylum conspired with others to escape from a lunatic asylum. This is neither a crime nor a misdemeanor under the common law or statute in the State of New York; nor is the con-

spiring of a lunatic confined in a lunatic asylum with others, to escape from a lunatic asylum a crime or misdemeanor under the common law or statute law of the State of New York.

"Fourth: Conspiring to escape from a lunatic asylum in the State of New York is not conspiring to pervert or obstruct justice, or the due administration of justice, under the laws of the State of New York.

"Fifth: According to the papers filed with all three requisitions, it is alleged, in effect, that your petitioner was, at the time of committing the conspiracy alleged, an insane person. If these allegations are true, the alleged acts of the petitioner which are relied upon to constitute the crime alleged, presumptively being the product of an insane mind, would not be of a criminal nature and would not constitute conspiracy.

"Sixth: If your petitioner had become sane within the short period elapsing between the decision of Justice Keogh and his escape, he had a right to escape under the law empowering Justice Dowling to send him to Matteawan, and he had a right to conspire to escape, if he was sane.

"Good faith is presumed in the demanding state, unless the contrary appears.

"Your petitioner alleges that the requisition papers in the three requisitions, the failure of the grand jury to indict in Dutchess County, the indictment in New York County by the grand jury before whom the Special Deputy Attorney General appeared as a witness while prosecuting this request, the failure to deport your petitioner to his home state, the State of Pennsylvania, under the law of the State of New York requiring such deportation, the repeated declarations of the representatives of

the State of New York that they were going to get possession of the body of your petitioner to re-confine him in Matteawan State Hospital, and the atmosphere of the proceedings on the part of the Special Deputy Attorney General of the State of New York prosecuting this requisition, all establish bad faith, and are convincing evidence of the purpose to obtain possession of your petitioner, not for trial on an indictment for conspiracy in the County of New York, but for re-confinement in the Matteawan State Hospital. Good faith cannot be presumed where the evidence rebuts it.

"Therefore, your petitioner asserts he is unlawfully detained of his liberty within the District of New Hampshire, in violation of the Sixth and Fourteenth Amendments of the Constitution of the United States and contrary to the provisions of Section 5278 of the Revised Statutes of the United States, and he most respectfully prays that he may be discharged."

Upon the foregoing amended petition a writ of *habeas corpus* was issued November 18, 1913 (p. 134). The return of Holman A. Drew, sheriff, having the custody of Thaw, alleges that he was at the time of the service of the writ of *habeas corpus* upon him holding Thaw in custody "by virtue of a certain warrant of the governor of the State of New Hampshire" which said warrant is annexed to and made a part of his return (p. 136). The warrant to which reference is made, found in the record (p. 138) is the extradition warrant issued by the governor of New Hampshire, dated November 8, 1913. To this return the relator made answer, the material parts of which are found in the record (p. 139) and are as follows:

"SECOND. That he (the relator) denies the allegations in the Fifth paragraph of said Answer, and says that said custody under said warrant of said Governor of said State of New Hampshire, was not legal and proper, and that said Drew is not entitled to have said custody restored by this Honorable Court, and for his reasons and grounds therefor, he respectfully refers this Honorable Court to the several reasons and grounds set forth in his Supplemental petition for a writ of *habeas corpus*, filed in this court on the 18th day of November, 1913.

"THIRD. And your petitioner further says, that said Drew is not legally entitled to have said custody restored by this Honorable Court, because the alleged New York custody, to which reference is made in the demand or application for extradition and the accompanying papers, and from which his escape is alleged, was not founded on due process of law, because the process of commitment was not only not based upon any trial or judgment under any issue of present sanity or insanity, or, in other words, of sanity or insanity at the time of commitment; and also, because the statute under which such commitment was made did not, and does not now, afford due and adequate remedies and opportunities for relief from illegal and oppressive custody, and for that reason, as well as for others, the New York statute is unconstitutional and the process founded thereon, without trial and proper findings, was not and is not due process within the meaning of the Federal constitution, and said custody is illegal and oppressive because it is not only based upon an unconstitutional statute and an order of commitment

without trial, but because, in effect, it is worse than sentence to penal servitude, in that it excludes all idea of executive clemency and pardon."

Subsequent proceedings for bail were had upon the petition of the relator filed in the District Court, December 6, 1913 (p. 141). The question of bail was, however, finally left open for the determination of this Court. The case came on for hearing in the District Court and was fully argued, both orally and upon briefs, and an opinion rendered by Aldrich, Judge, April 14, 1914, which opinion is printed at length in the record (pp. 211 to 231 inclusive).

The final order of the District Court made May 8, 1914, so far as material is as follows:

"FINAL DECREE.

May 8, 1914.

ALDRICH, J.

"Now on this day comes the petitioner herein, Harry Kendall Thaw, by his attorneys and comes also the respondent herein, Holman A Drew, by his attorneys, and this cause having been heretofore argued and submitted, the court now being fully advised in the premises, it is hereby

Ordered, Adjudged and Decreed that the writ of *habeas corpus* herein, issued on the eighteenth day of November, 1913, be sustained and that the petitioner herein, Harry Kendall Thaw, be discharged from custody under the extradition warrant issued by the Governor of the State of New Hampshire on the eighth day of November, 1913."

From this order the State of New York in the name of Holman A. Drew, sheriff, appealed to this court. Nine errors are assigned which are found in the record (p. 232), as follows:

"ASSIGNMENT OF ERRORS.

"And now comes the respondent herein, Holman A. Drew, by his attorneys and makes the following assignment of errors: The court erred:

"FIRST. In sustaining the writ of *habeas corpus* and discharging the petitioner, Harry Kendall Thaw, from custody under the extradition warrant issued by the Governor of the State of New Hampshire.

"SECOND. In holding that the petitioner, Harry Kendall Thaw, was not substantially charged with crime under Article IV, section 2, paragraph 2 of the Constitution of the United States.

"THIRD. In holding that the petitioner, Harry Kendall Thaw, was not a fugitive from justice under Article IV, section 2, paragraph 2 of the Constitution of the United States.

"FOURTH. In holding that the process under which the petitioner, Harry Kendall Thaw, was held was not due process of law under Article IV, section 2, paragraph 2 of the Constitution of the United States.

"FIFTH. In holding that the warrant of extradition issued by the Governor of the State of New Hampshire was illegal, invalid and unwar-

ranted under Article IV, section 2, paragraph 2 of the Constitution of the United States.

"SIXTH. In holding that upon the whole record this case does not come within the provisions of the Constitution of the United States relating to extradition.

"SEVENTH. In not holding that the petitioner, Harry Kendall Thaw, was legally in custody under the warrant of extradition issued by the Governor of the State of New Hampshire.

"EIGHTH. In not dismissing the writ of *habeas corpus* and in not remanding the petitioner, Harry Kendall Thaw, to the proper custody for extradition to the State of New York.

"NINTH. Because upon the whole record the writ of *habeas corpus* should have been dismissed, the warrant of the Governor of the State of New Hampshire sustained and the petitioner, Harry Kendall Thaw, remanded to the proper custody for extradition to the State of New York."

Thereupon a supersedeas order was made and bail refused, and Thaw was ordered into the custody of a keeper exercising federal authority there to remain pending the appeal to this Court.

Such are the primary facts and history attending the detention of the petitioner from which he seeks his discharge. A more detailed account of the facts deemed material will be entered into during the progress of the argument.

Argument.

APPELLANT'S ASSIGNMENT OF ERRORS.

ASSIGNMENTS NOS. 1 AND 5.

These assignments are general in their character in that they allege errors in the District Court because the relator's writ was sustained and the prisoner discharged.

ASSIGNMENTS NOS. 6, 7, 8, 9.

These assignments are likewise general and mere statements of the reverse of the proposition alleged in the first assignment. All we can make of them is that error is assigned because the District Court did not dismiss the relator's writ and remand him to the custody of the extradition officers of the State of New York.

ASSIGNMENT NO. 2.

This assignment is more specific in that it alleges error in the District Court for holding that Thaw was not *substantially charged* with a crime.

ASSIGNMENT NO. 3.

This assignment alleges error in the District Court for holding that Thaw was not a *fugitive from justice*.

ASSIGNMENT NO. 4.

This assignment in its general aspect is also general in its character. It alleges error in holding each process under which the petitioner was held was not due process of law under Article IV, Section 2, Paragraph 2 of the Constitution of the United States.

The appellant's assignments of error reduced to their lowest terms amount to an exception to the ruling of the District Court, because it was held that Thaw was not

(1) substantially charged with a crime;

(2) a fugitive from justice;

(3) held under due process of law within the meaning of the Federal Constitution.

Power of Courts to Review Acts of Executive in Extradition Cases.

Some question has been made as to the authority of the court to review executive action in extradition cases. While such authority to a limited extent is not denied by our opponents, the exact extent of the authority has been questioned.

All interstate extradition is regulated by law. It rests for its foundation upon Article IV, Section 2, Subdivision 2 of the Constitution of the United States, and Section 5278 of the Revised Statutes of the United States.

In the case of *In re Kopel,* 148 Fed., 505, Hough, D. J., affirms the law to be, as stated by Cullen, J., in the case of *Cochran vs. Hyatt,* 172 N. Y., 176, 182, as follows:

> "It will thus be seen that the condition of a citizen of one state surrendered to another for criminal prosecution has not the safeguards which exist in international extradition, for the surrendering state is without any standing to intervene in his

behalf however much its process may be abused. Therefore, it necessarily follows that no person can or should be extradicted from one state to another unless the case falls within the constitutional provision, and that the power which independent nations have to surrender criminals to other nations as a matter of favor or comity is not possessed by the states."

It is therefore to the law and not to the principles of comity that we must look for the authority to order the rendition of a person charged with having committed a crime from one state to another. The constitutional and statutory law governing the subject of interstate extradition is as follows:

Const. Art. IV, Sec. 2, Sub-div. 2.

"A person charged in any state with treason, felony or other crime, who shall flee from justice and be found in another state, shall on demand of the executive authority of the state from which he fled be delivered up to be removed to the state having jurisdiction of the crime."

Section 5278, U. S. Rev. Stat.

"Whenever the executive authority of any state or territory demands any person as a fugitive from justice of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found or affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such

person has fled, to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the state or territory making such demand shall be paid by such state or territory."

The State of New Hampshire has passed laws relating to the apprehension of fugitives from justice, which laws are found in the Public Statutes of New Hampshire, Chapter 263, but these are only in aid of the federal laws, and it is to the federal laws that we must look for the governing power.

In extradition matters three primary questions arise for the consideration of the executive of the asylum state:

I. Is the accused substantially charged with a crime against the laws of the demanding state?

II. Is the accused a fugitive from justice?

III. Is the requisition sought for an ulterior or private purpose?

The action of the governor of the asylum state is open to review in the courts upon a writ of habeas corpus upon all of these questions.

Authority for the review of the first question is found in the case of *Roberts vs. Reilly*, 116 U. S., 80, 95, wherein Mr. Justice Matthew says:

> "It must appear, therefore, to the governor of the state to whom such a demand is presented, before he can lawfully comply with it, first, that the person demanded is substantially charged with a crime against the laws of the state from whose justice he is alleged to have fled, by an indictment or an affidavit, certified as authentic by the governor of the state making the demand; and, second, that the person demanded is a fugitive from the justice of the state the executive authority of which makes the demand. The first of these prerequisites is a question of law, and is always open upon the face of the papers to judicial inquiry, on an application for a discharge under a writ of habeas corpus."

Authority for a review of the second question is found in the case of *Munsey vs. Clough*, 196 U. S., 364, 372, wherein Mr. Justice Peckham says:

> "The proceedings in matters of this kind before the governor are summary in their nature. The questions before the governor * * * are whether the person remanded has been substantially charged with a crime, and whether he is a fugitive from justice. The first is a question of law and the latter is a question of fact, which the governor, upon whom the demand is made, must decide upon such evidence as is satisfactory to him. * * * The issuing of the warrant by him, with or without a recital therein that the person demanded is a fugitive from justice, must be regarded as sufficient to justify the removal, until the presumption in favor of the legality and regularity of the warrant is over-

thrown by contrary proof in a legal proceeding to review the action of the governor."

See also:

Hyatt vs. Cochran, 188 U. S., 691;
People ex rel. Lawrence vs. Brady, 56 N. Y., 182, 186.

Authority for a review of the third proposition may be found in the case of *Ex parte Slauson*, 73 Fed., 666, which was a requisition made by the Governor of Tennessee upon the Governor of Virginia for the rendition of one Slauson for the crime of fraudulently appropriating money. Extradition was granted. Whereupon Slauson brought a writ of *habeas corpus* in the federal court to secure his discharge from custody. Hughes, D. J., in the course of his opinion, says:

> "Slauson is here clothed by law with the right to show why he should not be taken away from his wife and children and his home in Petersburg, to the distant state of Tennessee, and there tried on the vague charge, upon merely individual affidavit, of fraudulent appropriation of money. He has a right to show here that he has not committed the crime of a fraudulent appropriation of money, and he has the right to show, moreover, the animus of the person who has instituted this proceeding. This writ would be a mockery in the case at bar if it were not competent for me to inquire whether the governor of Tennessee has been imposed upon by false affidavits. * * * Comment upon his (complainant's) conduct is unnecessary. His charge of fraud against Slauson is an afterthought. The affidavit by which he charged the fraud is a flagrant perjury. His prosecution of this extradition proceeding is malicious. The Governor of Tennessee

was deceived, and the requisition which he issued for Slauson was improvidently granted. The Governor of Virginia was not advised of, and had no means of testing the truth of, the allegations of the requisition; but, in performing his duty in issuing his warrant directing the arrest of Slauson, he took care to reserve to him in advance the privilege of the writ of *habeas corpus*, under which he is now before me."

In *Tennessee vs. Jackson*, 36 Fed., 258, which was an interstate requisition between the states of Tennessee and Illinois, it was said:

"The whole proceeding was a fraud upon the law. If this arrest and imprisonment are to be maintained the opportunities for wrong and abuse of this law will be great and widespread. * * * It seems to be that the general government cannot stand by and see its laws so trifled with and abused. It is well settled, as I understand it, that where treaties between this government and a foreign nation provide for the extradition of persons charged with certain specific offenses, and where extradition has been obtained upon the ground that such offense has been committed, the person whose custody and return has been so obtained, cannot, when brought in the jurisdiction of the court, be tried for a different offense, especially if it be not embraced in the terms of the treaty.

Such a case is not altogether analogous to the one in hand, but it tends to show the good faith required between nations. Certainly the same character of faith should obtain between the executive authorities of the different states of this nation, which in many respects are foreign to each other.

> It seems to me that such authorities should not be held to the seizure and removal of a citizen of its state when such seizure and removal were procured by fraud, falsehood, and imposition. It is ordered that the petitioner be discharged."

We are aware that the last mentioned case has been criticised in later decisions, notably in the case of *In re Cook,* 49 Fed., 833, but the criticism has been directed to the fact that the court took jurisdiction and discharged the prisoner after he had been surrendered to the demanding state. So far as we are informed there has been no criticism of the case because of the fact that the court considered the question of good faith.

In the case of *In re Cook*, cited *ante*, Jenkins, D. J., commenting on the case of *Roberts vs. Reilly, supra*, says:

> "That decision by its very terms implies that the action of the governor is only presumptively regular, and can be reviewed by the courts. Surely it cannot be claimed that such action is conclusive upon personal right, and may not be inquired of by judicial tribunals. Surely it cannot be that the right to personal liberty hangs on so slender a thread as the arbitrary will of the authorities of the demanding and surrendering states. No person shall be deprived of his life, liberty, or property without due process of law. That is the fundamental law of the land, coming to us from Magna Charta. It is not due process of law which condemns without hearing, which convicts without trial."

In the case of *United States vs. Pope*, Fed. Cas. No. 16,069, Judge Lowell, then one of the district judges

of the first circuit, says, with respect to extradition papers:

> "In extradition between the United States and other nations copies of the warrants and of the depositions on which it was founded are made evidence (Revised Statutes, Section 5271), and in extradition between the states a copy of the indictment or of an affidavit is sufficient (Revised Statutes, Section 5278). In both of these classes of cases, the executive authority, whether of the state or the nation, has an ultimate discretion whether to surrender the supposed criminal or not; and they often refuse, though the papers are in due form and unimpeached, *if there is good reason to believe that some ulterior object or sinister design is concealed under the regular forms.*"

Our position with reference to the good faith of the demanding state, or, more properly speaking, the officers thereof, has been vigorously attacked. We still persists in the belief that the motive is or may be a controlling element influencing executive action and judicial decisions in extradition cases. We unhesitatingly say that such is the common practice, particularly in cases having for their foundation charges of obtaining money under false pretences wherein it is made plain that the proceeding is instituted for the purpose of obtaining jurisdiction for the collection of a debt. Under such circumstances it would be a travesty on the law to permit the Constitution to be made use of as an instrument to subserve the ulterior purposes of persons actuated by hope of private gain.

See also:

Work vs. Corrington, 34 Ohio St., 64;
In re Herres, 33 Fed., 165, 167.

In the case last above cited, which, however, was a case of international extradition, it is said that the courts should review the proceedings to see that no extradition is consummated upon mere pretext or to subserve private malice. The same reasoning that applies to international extradition would seem to apply to interstate extradition. The liberty of the subject is as sacred in one instance as in the other and should be protected by the same safeguards.

That the person charged may invoke the aid of either the federal or state courts through the medium of a writ of *habeas corpus* to secure his release, if illegally detained on requisition papers, is no longer an open question. This seems to be settled in the case of *Roberts vs. Reilly, ante*, wherein it is said:

> "It follows, however, that, whenever the executive of the state, upon whom such a demand has been made, by virtue of his warrant, causes the arrest for delivery of a person charged as a fugitive from justice of another state, the prisoner is held in custody only under color of authority derived from the Constitution and laws of the United States, and is entitled to invoke the judgment of the judicial tribunals, whether of the state or the United States, by the writ of *habeas corpus*, upon the lawfulness of his arrest and imprisonment."

See also:

Ex parte Joseph Smith, 3 McLean, 121, 131.
Ex parte Morgan, 20 Fed., 298.
Ex parte McKean, 3 Hughes, 23.

The burden of strict compliance with the constitution and statutes is upon the demanding state. Juris-

dictional facts must be alleged and proven. This is the law in this country and in England.

In the case of *Ex parte Hart*, 63 Fed., 249, 260, Goff, C. J., says:

> "To authorize the removal of a citizen of Maryland to the State of Washington for trial on a charge of crime something more than the oath of a party unfamiliar with the facts that he believes the allegations of an information to be true should be required, and is demanded by the law. To hold otherwise would enable irresponsible and designing parties to make false charges with impunity against those who may be the subjects of their enmity, and permit them, after they have caused public officials to believe their representations, to secure the arrest, imprisonment, and removal of innocent persons on papers regular in their character, but without merit and fraudulent in fact. * * * The claim that the act of the governor of a state in issuing his warrant of removal is conclusive, and that the presumption is he had the necessary papers, duly authenticated, before him, when he acted, cannot be assented to. The act of the governor can be reviewed, and, if he has not followed the directions and observed the conditions of the constitution and laws of the United States, pertinent to such matters, can be set aside as void. The highest as well as the most obscure official must respect the requirements of the constitution and the laws made thereunder. The acts of the executive are subject to review by the courts by means of a writ of *habeas corpus*. It is not now necessary to cite authorities on this question, nor to recall incidents in the Eng-

lish history, showing that this writ will issue, no matter how obscure the prisoner, nor how great the power of the official who detains him."

In *Ex parte Perciral*, 21 Cox's Cr. Cas., 387, Lord Alverstone, speaking of the English Fugitive Offender's Act (1881), the text of which is contained in the report of that case, says:

> "I think that every person who comes and asks for a fugitive offender to be delivered up under that statute must be prepared with evidence to show that that condition of the statute has been fulfilled. I think that is a very important matter, having regard to the fact that we are dealing with the criminal law, and that we must apply the general principles of the criminal law and require that the prosecutor must make out his case. We are also dealing with the liberty of the subject, and with a branch of the criminal law which affects the liberty of the subject, and I therefore think that that condition should be clearly fulfilled."

In the case at bar, it is the indictment which must furnish the foundation for the right to extradite and not the charge certified to by the governor of the demanding state. If the indictment does not charge a crime, the certification of the governor amounts to nothing. The language of Section 3278, *ante*, is clear on this point.

It is the duty of the court of the asylum state to examine into the laws of the State of New York to ascertain whether the indictment charges a crime under the statutes of that state.

Mr. Justice Matthews, in the case of *Roberts vs. Reilly*, 116 U. S., 80, says:

> "The courts of the United States to whose process the relator has appealed take judicial notice of the laws of all states."

I.

IS THE ACCUSED SUBSTANTIALLY CHARGED WITH A CRIME AGAINST THE LAWS OF THE STATE OF NEW YORK?

The crime alleged against Thaw is conspiracy to effect his escape from the Matteawan State Hospital where he was being detained as an insane person. Under this heading we raise the following questions:

Point 1. His detention in Matteawan was unlawful

(a) because he was committed under an order which contravenes the Sixth and Fourteenth Amendments of the Federal Constitution;

(b) because he was not committed in accordance with the terms of the New York statute.

Point 2. His escape from the Matteawan State Hospital was neither *malum in se* nor *malum prohibitum*.

Point 3. The indictment against him does not allege a confederacy to commit an unlawful act nor a confederacy to commit a lawful act by unlawful means.

Point 4. An insane person cannot be substantially charged with a crime within the meaning of the extradition laws.

Several different reasons were urged by counsel for the relator in the District Court for Thaw's discharge. Among others, the constitutionality of the New York statute under which Thaw was committed was questioned. Judge Aldrich, in his opinion, sustaining the writ of *habeas corpus*, based his decision on a single point, without passing on the other questions argued. Reference, however, is made in the opinion to the several questions raised (p. 226-7), and we still urge the same points as additional reasons why the ruling of the District Court should be sustained.

POINT I (a).

THAW WAS COMMITTED UNDER AN UNCONSTITUTIONAL STATUTE.

Was Thaw's detention in Matteawan a lawful detention? If it was not, he had a right to effect his escape, and he had a right to conspire to escape, and it follows that the indictment charging him with conspiracy to escape does not substantially charge a crime within the federal constitution and laws governing interstate extradition. The indictment alleges Thaw's commitment to Matteawan by order of Justice Dowling on February 1, 1908. It alleges a conspiracy to escape entered into on August 14, 1913, and an escape on August 17, 1913. The allegations of conspiracy set forth in the indictment are as follows:

> "That he with others did unlawfully, fraudulently and maliciously conspire, combine, confeder-

ate and agree together between and among themselves and with divers other evil-disposed persons to the grand jury aforesaid as yet unknown, illegally and fraudulently to cause and procure the said Harry K. Thaw to escape from the said hospital, and illegally to go at large by such dishonest, corrupt, fraudulent, deceitful and illegal means, methods, devices and practices as they should thereafter deem available to the great and manifest perversion and obstruction of justice and to the due administration of the laws."

At the close of Thaw's trial for homicide, he was acquitted by the jury on the ground that he was insane at the time he committed the act. Without further trial or hearing, he was sent to Matteawan State Hospital for the criminal insane, there to be confined until discharged by due course of law under and by virtue of the authority of Section 454 of the Code of Criminal Procedure of the State of New York, *ante*. This was done without notice to him, without hearing, without a chance to produce witnesses in his behalf and without a right of appeal.

Individual judges of the courts of New York have in the various Thaw cases upheld the constitutionality of the statute under which he was committed to Matteawan on different grounds. We desire to review these decisions and discuss the different reasons given for sustaining the statute.

Justice Rich in his opinion in *People ex rel. Peabody vs. Chanler*, 133 N. Y. App. Div., 159, 171, in attempting to justify Thaw's commitment and in his attempt to sustain the constitutionality of the statute,

says, "that the commitment of Thaw was essentially temporary cannot be seriously questioned;" and Justice Jenks, at page 163, says: "The order of commitment settles nothing finally or conclusively against the person committed."

Are these facts? Was Thaw committed temporarily until the question of his sanity at the time of his commitment could be determined upon notice and hearing by a court of competent jurisdiction, or was his commitment permanent and final under the statute? By no stretch of the imagination can it be said that it was a temporary commitment. It was for an indefinite length of time until he should be discharged by "due course of law." It was a commitment which might continue for life. It was as final and conclusive as final sentence and commitment under any criminal statute. If the words "until he be discharged by due course of law" are to be interpreted as meaning, in the language of the statute, "until sane"—a question which we will discuss later—then it *presupposes an adjudication that he was insane when committed.* Such adjudication was a final judgment under the statute; it was as final as the statute is susceptible of. If he had not been adjudicated to be then insane there was no authority to commit him. It is this adjudication against him without notice, trial, chance to defend or chance to appeal, that he had then and now has a right to complain against. The question of his sanity at the time he committed the homicide, June 26, 1906, was put in issue and determined by the jury, but the question of his sanity on February 1, 1908, was never tried, was never formally charged against him, and never defended against by him. Any statute which in terms permits a court on its own motion, in its own discretion, to pass final sen-

tence against a person depriving him of his liberty for an indefinite period of time, putting the burden and expense of securing his release upon him, is vicious from its inception and deprives a person of his liberty without "due process of law" within the meaning of the Sixth and Fourteenth Amendments to the Constitution of the United States. It is not "due process of law" when a final sentence can be passed committing the body of a citizen to a madhouse for an indefinte period of time without notice or trial.

Thaw's commitment was not analogous to a temporary detention of a prisoner awaiting trial wherein the prosecution still has the burden of proving the prisoner's guilt making him subject to sentence and further confinement. It cannot be said that such was the nature of his commitment for it shifted the burden and expense onto him of securing his release by proving himself sane.

As has been often said, the constitutional validity of a statute is to be tested, not by what is done under it, but what may be done under it. (*Stuart vs. Palmer*, 74 N. Y., 183, 188.) The section of the New York Code referred to, permits a single person, the presiding justice in any trial of a criminal cause, to exercise his discretion and pass final judgment, if the jury return a verdict of not guilty by reason of insanity, committing the accused to an indefinite period of confinement in a hospital for the criminal insane, without notice, hearing or right of appeal. Such are the possibilities following the language of the statute. Such was the procedure in the case of Thaw. Such statutes have been and should be held unconstitutional.

The case of *In re Boyett*, 136 N. C., 415, was one involving the constitutionality of a similar statute of the

State of North Carolina. Connor, J., commenting on a similar Minnesota case, says:

> "The statute under which the defendant was committed to an asylum in that case was in several respects similar to our own. The court declared it void. It is true that it is provided that the person acquitted is to be kept in custody for treatment and cure. The fatal infirmity in the statute is that the power to commit is vested in the court to be exercised in its discretion. No provision is made for notifying the person whose liberty is involved, nor is the court required to make any investigation, either by itself, by the examination of witnesses, by calling to its aid medical experts or otherwise."

The statute was held unconstitutional.

The case of *Brown vs. Urquhart*, 139 Fed., 846, involved the consideration of a similar statute in the State of Washington. Hanford, D. J., says:

> "If the imprisonment of the petitioner is in fact a deprivation of his liberty without due process of law, in violation of the national constitution, an adjudication adverse to his contention by the Supreme Court of the state is not conclusive upon the Federal Courts, for the constitutional prohibition of the use of despotic power to deprive any person of liberty without due process of law applies to the state, and restrains all departments of the state government, including the judiciary, and forbids compliance with judicial process issued in disregard of the essential requirements of the orderly procedure recognized in this country as constituting due process of law. * * * If this statute must be construed, as it seems to have been by the Supreme

Court of this state, as a law authorizing the judge of the trial court to commit a defendant to jail after a verdict of acquittal on the ground of insanity, without a new arraignment upon a formal complaint or information setting forth the specific facts constituting cause for committing him to jail, and an opportunity given to controvert the averments of such complaint or information, or interpose a lawful defense, it is, in my opinion, unconstitutional and void."

It is true that the decision in the last mentioned case was reversed on appeal to the United States Supreme Court in *Urquhart vs. Brown*, 205 U. S., 179, but the reversal was on a question of practice and no opinion is expressed as to the merits of the controversy. The decision of the United States Supreme Court on the question of practice is not applicable to the case at bar, because the question is here raised in extradition proceedings founded on the federal laws, and as already shown above, the United States Supreme Court has clearly held that the petitioner may pursue his right under a writ of *habeas corpus*, either in the state or federal courts. It is the law governing extradition that gives the court jurisdiction in the case at bar, and distinguishes it from the *Urquhart case*. The decision of the same question by the Supreme Court of the State of Washington, antedating the decision of the Federal Court, is found in *In re Brown*, 39 Wash., 160.

In the case of *State ex rel. Blaisdell vs. Billings*, 55 Minn., 467, 474, it is said:

"It follows that any method of procedure which a legislature may, in the uncontrolled exercise of its power, see fit to enact, having for its purpose

the deprivation of a person of his life, liberty, or property, is in no sense the process of law designated and imperatively required by the constitution. And while the state should take charge of such unfortunates as are dangerous to themselves and to others, not only for the safety of the public, but for their own amelioration, due regard must be had to the forms of law and to personal rights. To the person charged with being insane to a degree requiring the interposition of the authorities and the restraint provided for, there must be given notice of the proceeding, and also an opportunity to be heard in the tribunal which is to pass judgment upon his right to his personal liberty in the future. There must be a trial before judgment can be pronounced, and there can be no proper trial unless there is guaranteed the right to produce witnesses and to submit evidence. The question here is not whether the tribunal may proceed in due form of law, and with some regard to the rights of the person before it, but, rather, is the right to have it so proceed absolutely secured? Any statute having for its object the deprivation of the liberty of a person cannot be upheld unless this right is secured, for the object may be attained in defiance of the constitution, and without due process of law."

The case of *Underwood vs. People*, 32 Mich., 1, involved the constitutionality of a statute of the State of Michigan. The petitioner brought a writ of error from a judgment of the Recorder's Court of Detroit, whereby he was committed to the State Prison Insane Hospital as a person charged with murder and acquitted on the ground of insanity. He claimed that the statute was

invalid. The opinion of the court was written by Campbell, J., and in it he says:

"There can be no reason to doubt the propriety of making provision to secure to such unfortunate persons protection and care, in such a way as to prevent them injuring or being injured, if they are dangerous or in need of seclusion. The state has an ultimate guardianship over *non compotes,* in cases where it is necessary. But, inasmuch as such authority can only exist over those who are thus disqualified, the power of determining their condition is one of great importance, and one which especially involves judicial oversight. In this country, where all legislation must be within constitutional limits, and does not reach the full parliamentary range, private liberty can never be subjected to the mere discretion of any person. No one can be deprived of liberty without due process of law. Any involuntary control, or seclusion, is imprisonment, and that is only justifiable when enforced under valid laws. Every person has a right at all times to resort to the courts to have the legality of restraint determined, unless he is imprisoned under a valid judgment, under proceedings where he had a regular trial or hearing. * * * but the more serious difficulty is in the nature of the proceedings themselves. In the first place, the prisoner is sent into confinement without any legal investigation into his condition at that time when he may be perfectly sane, and when, having been acquitted, he is entitled to all the privileges of any innocent man. There may be a very long interval between the offense and the trial. Having been so secluded, he is excluded from the right, and all others are excluded from the power of resorting to

any effectual means, or any means whatever, of securing a judicial inquiry, into his sanity. Neither judge nor expert has any power under our constitution to select his own means and process of inquiry, and pass *ex parte* upon the liberty of citizens."

The opinion in the above case was concurred in by Cooley, Judge, and Graves, Ch. Judge. Because of the recognized legal ability of Judge Cooley on questions of constitutional law, this opinion is entitled to great respect.

In the case of *In re Lambert*, 134 Cal., 626, it is held that the provisions of the act of March 31, 1897, known as the Insanity Law in the State of California, so far as they purport to authorize the commitment to and retention in an asylum of a person alleged to be insane, without giving him prior notice and an opportunity to be heard on the charge against him, lacks the essential elements of due process of law and are unconstitutional.

In the case of *The People ex rel. Ordway vs. Sanitarium*, 34 N. Y. App. Div., 363, it is held that a commitment under Chapter 467 of the Laws of 1892 of the State of New York of an inebriate female to a sanitarium for the term of one year from the date thereof, or for so much of said term as may be necessary in the judgment of the trustees, for treatment and reformation, issued in proceedings instituted, carried on and concluded without notice to the person so committed, without a hearing and without her presence, is not due process of law. It is also held that such commitment is final in its nature and not merely temporary.

In the case of *Simon vs. Craft*, 182 U. S., 427, it is held as follows:

> "The essential elements of due process of law are notice and opportunity to defend, and in determining whether such rights are denied, the court is governed by the substance of things and not by mere form.
>
> The due process clause in the Fourteenth Amendment to the Constitution does not necessitate that the proceedings in a state court should be by a particular mode, but only that there should be a regular course of proceedings, in which notice is given of a claim asserted and an opportunity afforded to defend against it."

In *Tiedeman's Limitations of Police Power*, p. 107, in a discussion of this question, it is said:

> "It is a constitutional provision of all the states, as well as of the United States, that 'no man shall be deprived of his life, liberty, and property, except by due process of law.' There must be a judicial examination of the case, with a due observance of all the constitutional requirements in respect to trials; and the restraint of one's liberty, in order to be lawful, must be in pursuance of a judgment of a court of competent jurisdiction, after one has had an opportunity to be heard in his own defense. This is the general rule. The imprisonment of a criminal, except as preliminary to the trial, can only be justified when it rests upon a judgment of the court. Since this constitutional provision is general and sweeping in its language, there can be no doubt of its application to the case of confinement of the insane, and we would, from a consideration of this constitutional guarantee, be

forced to conclude that, except in the case of temporary confinement of the dangerously insane, no confinement of that class of people would be permissible, except when it is done in pursuance of a judgment of court, after a full examination of the facts and after an opportunity has been given to the person charged with insanity to be heard in his own defense. Indeed, there is no escape from this conclusion."

Other analogous cases on this point are:

City of Portland vs. City of Bangor, 65 Me., 120;
Matter of Kenny, 23 N. Y. Misc., 9;
Stuart vs. Palmer, 74 N. Y., 183;
Matter of Blewitt, 131 N. Y., 541;
People ex rel. Sullivan vs. Wendall, 68 N. Y. Supp., 948;
In re James, 30 How. Pr., 446;
In re Bryant, 3 Mackey (D. C.), 489;
Sporza vs. German Savings Bank, 192 N. Y., 8;
Smith vs. People, 65 Ill., 375.

Another reason why the statute is unconstitutional is, that it is discriminatory in that it applies only to such respondents as are in custody at the time the jury returns its verdict. The man who is of sufficient means to obtain bail and is fortunate enough to do so, cannot be committed under the statute, while the poor fellow who, from lack of means or friends cannot get bail, is in danger of being thrown into an asylum for the insane, without a chance to be heard in his own defense, there to remain for life or an indefinite period of time. If two persons equally insane were jointly indicted and tried for a crime, the maximum penalty for which

was six months in jail and both were acquitted on the ground of insanity, one being in custody and the other out on bail, the former could, in the discretion of the court, be committed to confinement for life and the other walk out of the court house a free man. The former would in some respects be in a worse position than a convicted criminal because the statute denies him the privilege of applying for executive clemency and pardon.

Such discriminatory laws are in conflict with the Fourteenth Amendment of the Federal Constitution (*Connolly vs. Union Sewer Pipe Co.*, 184 U. S., 540, 558).

We have not overlooked the reasoning of Justice Rich in the case of *People ex rel. Peabody vs. Chanler*, 133 N. Y. App. Div., 159, cited *ante*, sustaining the validity of Thaw's commitment, found on page 171 of the above report. From his opinion it appears that the constitutionality of the law under which Thaw's commitment was made, was sustained by the New York Court on the ground that a writ of *habeas corpus* afforded Thaw a method of relief if he could show that he was sane. It is also said that he might be discharged by the Lunacy Commission, or upon a certificate of recovery from the superintendent of the institution, approved by the Court, but this reasoning merely begs the question; it overlooks the illegality of the original commitment and tells us how a person can get out of an insane institution after he has once been illegally committed. The argument is specious. It would, by parity of reasoning, sustain a statute which would permit a court to sentence and commit a person to jail for larceny without notice, hearing or right of appeal, because if

his detention is unlawful under such commitment he can thereafter, by writ of *habeas corpus*, secure his release, if he can purge himself of the offense.

Such reasoning does not carry the weight of conviction necessary to sustain the validity of the statute.

We believe the dissenting opinion of Justice Gaynor, beginning on page 174 in the case above cited, is founded on better reasons and is sustained by greater weight of authority. We quote the following from his opinion:

> "To say that since he is not remediless, that as he may resort to the writ of *habeas corpus* or some other means of a hearing to establish his sanity and regain his liberty, he is not deprived of due process of law, is to miss the purpose of that safeguard, with all due respect to judicial opinions which suggest the thing. It requires that a hearing be given before a permanent judgment or order depriving one of his liberty, and does not intend the hearing which he may afterwards be able to get by dint of seeking relief against his unlawful commitment. The principal office of the writ is to get people out who have been committed without due process of law, and on that ground."

In the above quotation, Justice Gaynor strikes at the root of the controversy. It is not how a man may be released from prison after he has been illegally committed, but whether the law permits an illegal commitment, that measures the constitutionality of the statute. There has always, since the Habeas Corpus Act of 1679 been law enough to get a man out of illegal confinement after he has gotten into it, and were that all that is

necessary to sustain the constitutionality of a statute, no law could be held unconstitutional within that part of the Fourteenth Amendment to the Constitution which guarantees that a man shall not be deprived of his liberty without due process of law.

It has been held by the courts of New York in the case of the *People ex rel. Ordway vs. Sanitarium, ante*, that:

> "The provisions of a statute declaring that nothing contained in the act shall be construed to limit the power of the courts to review by *habeas corpus* the detention of any person committed under the act, is not a provision for due process of law, as that term means process issued before final judgment is rendered."

In the case of *Holden vs. Hardy*, 169 U. S., 366, 389, Mr. Justice Brown says:

> "This court has never attempted to define with precision the words due process of law, nor is it necessary to do so in this case. It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the union may disregard, as that no man shall be condemned in his person or property without due notice and an opportunity of being heard in his defense."

In the case of *Rouse, Hazard & Co. vs. Circuit Judge*, 104 Mich., 234, 239, Grant, J., defines due process of law as follows:

> "The due process of law required by the constitution means that notice or summons by which a party is tendered his day in court, with the right

to frame an issue and be heard before a judgment can be rendered or execution issued which shall take away his liberty or property."

Daniel Webster, in his argument in the case of *Dartmouth College vs. Woodward*, 4 Wheat., 518, 581, defines the law of the land which is the equivalent of due process of law, as follows:

"By the law of the land is most clearly intended the general law; a law, which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society. Everything which may pass under the form of an enactment, is not, therefore, to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees, and forfeitures, in all possible forms, would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void. It would tend directly to establish the union of all powers in the legislature. There would be no general permanent law for courts to administer, or for men to live under. The administration of justice would be an empty form, an idle ceremony. Judges would sit to execute the legislative judgments and decrees; not to declare the law, or administer the justice of the country."

The grounds upon which Mr. Justice Morschauser attempted to sustain its constitutionality in *People ex*

rel. Peabody vs. Baker, 59 Misc. Rep., 359, is not tenable. He predicated his opinion that the law was constitutional on the fact that in his trial for homicide, Thaw had a right to introduce evidence of his present condition, citing *People vs. Hoch*, 150 N. Y., 291, and *People vs. Koerner*, 117 App. Div., 40. If this were the law, a trial for homicide would involve two issues to the great injury of a respondent. It would put him in the anomalous position of showing that he was insane when the crime was committed but not so insane at the time of trial as to be dangerous to go at large.

It is needless to say that no other judge in New York before whom this statute has been brought in question, has attempted to sustain its constitutionality on any such ground; neither do the *Hoch* and *Koerner* cases warrant or sustain Judge Morschauser's position. They do hold that the mental condition of the accused may be shown subsequent to the day of the commission of the crime for its bearing on the issue of insanity at the time the crime was committed. In each of these cases the testimony of the respondent's subsequent condition was introduced by the prosecution. In the *Hoch* case it was held:

> "On the issue of insanity in a murder trial, the prosecution may elicit from a competent witness evidence as to the mental condition of the defendant at the time of the trial as bearing upon his condition at the time of the homicide."

The ruling in the *Koerner* case followed the *Hoch* case (see opinion, p. 48), and it was held that under the circumstances of the case the defendant's mental condition prior as well as subsequent to the homicide and at the time of the trial, might be shown for the

consideration of the jury, to the end that they might correctly determine his mental condition at the time the homicide was committed.

The opinions in the later Thaw cases are in conflict with the earlier opinions in the State of New York, yet the earlier cases are apparently not intended to be overruled.

When a second attempt was made by Thaw to secure his release in 1909 (see *People ex rel. Peabody vs. Chanler*, 117 N. Y. Supp., 322), Mr. Justice Jenks said:

> "The practical effect is that the legislature has prescribed that a successful defense of insanity shall not as a matter of course be followed by the absolute discharge of the defendant; but it may be followed by his commitment until he becomes sane. As such commitment is not a matter of course, but may be made only by that court, and only of a defendant in detention, whom the court deems dangerous to the public peace and safety, if discharged, and the commitment lasts only until the defendant becomes sane, we must infer that the legislature intended that the court would commit only after its conclusion that at the time of acquittal the defendant was insane, so as to be a menace to the public peace and safety. But as there is no provision for enlightenment of the court in any other manner, it must be that the legislature intended that the court could rest its conclusion upon the evidence given at the trial and the appearance of the defendant thereat. * * * *Although the inquiry at the trial would be directed to insanity at the time of the commission of the offense*, yet the evidence might establish that such insanity had not ceased, but had continued."

And in the same case, Mr. Justice Rich said:

"Upon the first and second questions, the relator's contention is based upon the assumption that the commitment under this section must rest upon the presumption that the insanity of the defendant existing at the time of the commission of the crime continued down to the time of the commitment, and that the legislature cannot constitutionally empower the court to act upon such a presumption; that it authorizes the commitment of a defendant acquitted of the crime for which he has been tried to a state lunatic asylum, and provides no way in which he can be discharged other than one dependent upon the volition of the superintendent of such asylum; and that it makes no provision for notice to the defendant and an opportunity to be heard upon the question of his mental condition at the time the commitment is made. These contentions are based, I think, upon the erroneous assumptions of the purpose and legal effect of the section, *and give no consideration to the police power of the state* and the manner of its exercise, or to the evidence upon which Mr. Justice Dowling acted in committing Thaw to the state hospital. The *jurisdiction of the state is inherent over a person deprived of his mental faculties.* It is its duty to protect the public as well as the unfortunate himself, from the danger incident to his disordered mental condition and insane acts, *and it has the authority under its police power to act summarily in so doing.*"

In the case of *People ex rel. Peabody vs. Chanler*, 133 N. Y. App. Div., 159, 171, Mr. Justice Rich says:

"That the commitment of Thaw was essentially temporary cannot be seriously questioned. His de-

tention under its provisions was to continue until he should become sane, for the time being, awaiting a contingency, to wit, the restoration to sanity. Other statutory provisions were amply sufficient to procure his release and discharge in the event that he became sane. Under Section 2015 of the Code of Civil Procedure he (or his friends acting for him and in his behalf) was at all times entitled to a writ of *habeas corpus* to determine the legality of his detention, and upon establishing in such proceeding his then sanity, he was entitled to be discharged."

Now we want the court to compare the reasoning in the several Thaw cases cited with the case of *People ex rel. Ordway vs. St. Saviour's Sanitarium*, 34 App. Div., 363. That was an appeal by Elizabeth Ordway from a judgment of the Supreme Court against her on a writ of *habeas corpus* to secure her release from the defendant institution where she had been committed pursuant to a statute of the State of New York. We quote from the opinion of the court:

"By the first section there is a delegation of power to retain a person in the custody of the respondent either for a fixed term (which in another part of the statute is made one year under an original commitment), or for such less period as in the discretion of the trustees of a private institution may be necessary for the treatment and reformation of a person committed. By section two of the statute, any judge of a court of record in the county or district where an alleged inebriate female resides, may commit her to the custody of the respondent, on the consent of the trustees, signed by their superintendent or executive officer,

and upon a certificate in writing of two physicians under oath showing that such female is over the age of eighteen years and is incapable or unfit to properly conduct herself or her own affairs, or is dangerous to herself or others by reason of habits of periodical, frequent, or constant drunkenness induced either by the use of alcoholic or vinous or other liquors, or opium, morphine or other narcotic or intoxicating or stupefying substance. * * *

It is difficult to define with precision the exact meaning and scope of the phrase 'due process of law.' Any definition which could be given would probably fail to comprehend all the cases to which it would apply. It is probably wiser, as recently stated by Mr. Justice Miller of the United States Supreme Court, to leave the meaning to be evolved by the gradual process of judicial inclusion and exclusion as the cases presented for decision shall require, with the reasoning on which such decisions may be founded. It may, however, be stated generally that 'due process of law' requires an orderly proceeding adapted to the nature of the case in which the citizen has an opportunity to be heard and to defend, enforce and protect his rights. A hearing, or an opportunity to be heard, is absolutely essential. * * *

These are the fundamental civil rights for the security of which society is organized, and all acts of legislation which contravene them are within the prohibition of the constitutional guaranty. In judicial proceedings due process of law requires notice, hearing and judgment: in legislative proceedings, conformity to the settled maxims of free government, observance of constitutional restraints, and requirements, and an omission to ex-

ercise powers appertaining to the judicial or executive departments. * * *

We refer to that process by or under which a person is detained for a definite period of time, as in this case of one year, and not to that summary process which issues to take into custody a supposed or an alleged dangerous or incompetent person, and under which he may be detained *until an investigation in the ordinary course of law may be had.* It is not open to contest that such temporary commitment of a summary character may be made *ex parte* and in the exercise of the general police power of the state to arrest and *temporarily confine* dangerous persons. They are due process of law, but where a person is confined by what is upon its face final process, and by which he is consigned to incarceration or restraint of his person by adjudication for a long period, that is to say, *by a judgment claimed to be binding upon him*, there is not due process of law unless he has had notice and hearing. * * *

We are of the opinion that the commitment under which this relator is held is not due process of law, and the proceedings under the act so far as they result in restraint for a year or a less period, depending upon discretion of those who detained the relator, are invalid, for the reason that no notice was given by which she might in the proceedings itself, by immediate intervention or subsequent opportunity to intervene, be heard in resistance of the accusation made against her. * * *

The situation is not saved by that section of the statute which declares that nothing contained in the act shall be construed to limit the power of the courts on habeas corpus; that is a remedy

which the relator would have in any event. The statute gave her in that regard no right she did not possess in common with every other person within the boundaries of the State of New York. Due process of law means process in a proceeding in which judgment is rendered against a person. It is in that proceeding at some stage before final judgment that she must have notice or, at all events, a hearing before she is condemned to long imprisonment or restraint."

Measured by the standard of the opinion in this case, we do not see how it can be contended for a moment that the statute under which Thaw was committed is constitutional. His commitment was a final process under the act. It was not temporary in any sense of the word, such as the detention of a person pending investigation, either on the charge of crime or on the charge of insanity. It so far committed him to the Matteawan State Hospital as to cast upon him the burden of securing his release. There was nothing further for the State of New York to do. It had discharged its obligation under the statute and exhausted its powers. If Thaw wanted to be released, the next move was upon him.

Following the reasoning in the *Ordway* case, *ante*, the constitutionality of the New York statute cannot be sustained under the police power of the state as that would authorize a temporary detention only until the person detained was again safe to go at large. The New York statute authorizes detention until sane, which may be long in excess of the period of the detention authorized by the police power. Any commitment made under the statute must be until the person "becomes

sane." It is the language of the statute and not the language of the court passing judgment that fixes the term of detention. "Until discharged by due process of law" can mean nothing more and nothing less than "until sane."

If the constitutionality of the New York statute rests on the inherent right of the state to care for those unfortunate persons who are unsafe to be at large, and under the rule that so much of a statute as is constitutional is to be saved (*State vs. Jackson*, 69 N. H., 511), then it is constitutional only so far as that inherent right exists, and authorizes detention only until a hearing constituting "due process of law" can be instituted, which in Thaw's case was never done. From the language of the New York cases, it appears that Thaw was being detained, not for punishment, but for safety. How long can such temporary commitment continue? We cannot, from authority, say what is the shortest length of time, but we can say that the longest time should not be extended beyond a reasonable time.

His detention might be justified under the police power, and, therefore, under the statute, for a reasonable length of time for the institution of proper proceedings authorizing a permanent commitment. The question of reasonable time is in the federal courts usually a question of law. The law would not justify his detention under the rule of reasonable time from February 1, 1908, until August 17, 1913, a period of five years, six months and sixteen days, without a formal complaint and hearing.

If the State of New York failed to institute within a reasonable time, proceedings to adjudge Thaw insane and unsafe to be at large, of which proceedings he was

given legal notice, and in which he was given an opportunity to defend, then his detention became unlawful, and he had a right to effect his escape in any way he could.

In conclusion, we say if the statute is unconstitutional, or if he were being detained an unreasonable time under the police power, or if he was safe to go at large, his detention was no longer legal.

But it may be argued that the defect in Thaw's original commitment is cured by his subsequent applications for release. This contention was urged, but not considered, in the *Peabody* case. We believe there is nothing in the contention. If the original commitment was under an unconstitutional law, his subsequent detention under the same law cannot be legal. He was still held under the original commitment at the time of his escape August 17, 1913. The intervening orders were orders dismissing his petition and remanding him to custody. In none of them was there any modification of the original order.

It may be argued that the question of the legality of Thaw's commitment is not open to us in this proceeding; that the question is *res adjudicata;* and that this proceeding is a collateral attack on a judgment of the highest court of the State of New York. If this case were one of mere error in the decision of the Court of New York it might be very properly argued that that decision was proof against collateral attack, but the question we raise is one of jurisdiction or want of authority to make the order because of the invalidity of the statute under which it was made. This question strikes at the foundation of the entire proceedings. The State of New York is now attempting to extradite Thaw

upon a process which depends entirely, for its validity, upon the legality of his confinement in Matteawan. If that confinement was illegal because his commitment was under a void statute, then he has a right to raise the question in this proceeding brought to secure his release from the custody in which he is held because of such commitment and detention. The judgment of any state court based upon a statute which is in contravention of the Constitution of the United States, is a nullity and is open to attack, either by direct proceedings or collaterally.

The case of *Medley, Petitioner*, 134 U. S., 160, arose on an application for a writ of *habeas corpus* brought to secure the discharge of the petitioner who was held in confinement under a sentence of death, by the judgment of the court of the State of Colorado. The petitioner was ordered to be discharged, and "entitled to have his liberty." Mr. Justice Miller says:

> "When, in the language of the judgment of the court, the prisoner was ordered to be kept by the warden of the penitentiary in solitary confinement until the day of his execution, and when the knowledge of the day and the hour of his execution was by the statute to be withheld from him, the constitution of the United States was violated, because the additional punishments were inflicted on him by reason of the direction of the statute, which we have just seen was an *ex post facto* law, and in those respects *void* as being forbidden by the Constitution of the United States."

In the case of *Minnesota vs. Barber*, 136 U. S., 313, the question of the validity of a statute of the State of Minnesota respecting the inspection of meat was

raised upon a petition for a writ of *habeas corpus* brought by one who had been convicted under the provisions of the act. Mr. Justice Harlan, in delivering the opinion of the court, says:

> "The presumption that this statute was enacted, in good faith, for the purpose expressed in the title, namely, to protect the health of the people of Minnesota, cannot control the final determination of the question whether it is not repugnant to the Constitution of the United States. There may be no purpose upon the part of a legislature to violate the provisions of that instrument, and yet a statute enacted by it, under the forms of law, may, by its necessary operation, be destructive of rights granted or secured by the Constitution. In such cases, the courts must sustain the supreme law of the land by declaring the statute unconstitutional and void."

See also *Yick Wo. vs. Hopkins*, 118 U. S., 356.

We do not need to multiply authorities on this point. If the statute of the State of New York under which Thaw was committed, is void, because in contravention of the Constitution of the United States, the judgment of the court of New York committing him under and by virtue of the statute, is likewise void; and if void he is at liberty to take advantage of that fact in any court and in any proceeding having for its foundation such judgment, or in which it is collaterally an issue. But we do not regard this as a collateral attack, because the question of the legality of Thaw's commitment and detention in Matteawan is one of the essential questions in the determination of the issues in the case at bar. Dismissal of one writ of *habeas corpus* does not bar further proceedings on a new writ, al-

though some of the same issues may be involved. (*People vs. Brady*, 56 N. Y., 182.)

We fail to see why all the questions touching the validity of Thaw's detention in Matteawan on the 14th day of August, 1913, the date of his alleged crime of conspiracy set forth in the indictment attached to the requisition papers, are not in issue. If on that date, he was illegally detained in custody under authority of an order of a court of justice, which order had for its foundation a statute void because in contravention of the Constitution of the United States, he had a right to effect his escape in any manner he could.

The conclusion is, that if Thaw was illegally detained in Matteawan by the courts of New York, in violation of the constitutional guarantee of personal liberty, he committed no crime by conspiring to escape from such commitment. He cannot stand substantially charged with a crime which the record shows he did not commit.

POINT I (b).

THAW'S COMMITMENT WAS NOT IN ACCORD WITH THE PROVISIONS OF THE NEW YORK CODE.

He was committed to Matteawan there to be detained "until discharged by due course of law." His commitment, if made at all, should have followed the language of the statute; he should have been committed "until he becomes sane." One expression is not the equivalent of the other. "Due course of law" may take years to reach a final determination.

Justice Rich in the *Peabody case* (133 N. Y. App. Div., 171), says:

> "He could not be detained a moment after establishing his restoration to sanity."

This language shows the fallacy of trying to substitute "due course of law" for the language of the statute "until he becomes sane." It puts the burden of establishing his sanity upon Thaw, and, if sane, illegally detains him while the law runs its "course."

Following the language of the statute a person acquitted by a jury by reason of insanity, may be committed to an asylum "until he comes sane." The moment he becomes sane, if that time can be known, he is entitled under the statute to his release. There is no authority for holding him longer. The only way that the order of commitment can be reconciled with the statute is to hold that by the words "due course of law" Justice Dowling did not contemplate any legal course but the mental change from insanity to sanity. So construing the order, it will read "there to be detained until sane."

We do not call attention to this manifest error in the language of the commitment with the view of urging it as a reason for Thaw's discharge. If it was error, it probably was one which could be taken advantage of only in the courts of New York upon appeal, if such a right exists under the New York statute, and we do not claim it is now open to us in this proceeding.

We call attention to it, however, so that undue weight may not be given to the language of the commitment. It is the statute which prescribes his term

of confinement and not the superintendent of the institution or the justice of any court. Insanity is a state or condition of the individual. If it can be said that there is a definite line separating sanity from insanity, the moment Thaw passed that line and became sane, if such is the fact, he was entitled to his discharge, although his condition remained undiscovered by the superintendent of the institution or by a justice of any court. His legal right to liberty was complete though it might not be established.

POINT II.

THAW'S ACTS WERE NEITHER MALUM IN SE NOR MALUM PROHIBITUM.

Ordinarily in indictments there is no need of an averment alleging the respondent's sanity or insanity, because the usual presumption is that the respondent is sane. There is no allegation in the present indictment that Thaw was sane or that the crime alleged was committed in a lucid interval. The circumstances of the case are extraordinary and peculiar. If, *contrary to what appears in the record*, the presumption of sanity can be said to prevail, a discussion of the case from that viewpoint will not be out of place.

It is not a crime to escape from a custody the authority for which is void in law or illegal. *State vs. Leach*, 7 Conn., 452.

In the case last mentioned, the respondent Leach was convicted of breaking jail and appealed. It ap-

peared that his original conviction had been under a statute that had been repealed.

Daggett, J., says:

"I am of the opinion that the direction to the jury was erroneous. The act of the prisoner in question was so far from being a high crime and misdemeanor, that it was justifiable. And here it is not intended to suggest, that the prisoner might not do acts which would be unjustifiable, in order to escape from unlawful imprisonment. He might not, for example, kill the goaler, or set the prison on fire, or totally demolish it; for none of these acts might be at all necessary to effect his object. But he might lawfully free himself from this imprisonment; since it is confessed to have been illegal. It appears that all the proceedings were void. A void process is no process. * * * This is the undoubted doctrine of the common law from the time of the *Marshalsea case*, 10 Co., 68, to this day. It hence results, that the keeper of the goal is vested with no authority; the building in which the prisoner was confined is not a goal, but as to him a mere private building; and hence he might regain that liberty of which he was unjustly deprived; and it is no part of the case that he might use more force than was necessary to accomplish this object."

In *Houch vs. The People*, 75 Ill., 487, Schofield, J., says:

"A majority of the court are of the opinion that, the affidavit being insufficient, the prisoner was improperly deprived of his liberty, and he was justified in asserting his right to his freedom, guaranteed to him by the constitution, and the law, by

refusing to submit to the warrant. In breaking away from the officer's custody, he committed no offense."

In *State vs. Williams*, 10 N. J. Law Journal, 293:

"The defendant Williams was convicted for an offense under the disorderly act. In support of an application to discharge the prisoner, counsel raised the point that the commitment was defective in that it did not state that Williams was convicted, but simply stood charged of the offense. On the hearing of the motion to discharge, both prosecutor and jailer appeared and objected to the defendant's discharge, and asked that he be remanded to prison to await the new charge of escaping from jail. The court discharged the defendant, holding that if the commitment was illegal, the defendant could not be punished for embracing an opportunity to escape."

It is not a crime to assist an escape from a custody the authority for which is void in law or illegal.

In the case of *People vs. Ah Young*, 92 Cal., 421, it is held:

"A departure from an unlawful imprisonment or custody is not an escape, within the meaning of the law; and one who without violence assists a person who is confined without authority by process of law to depart from his place of confinement, is not guilty of the crime of assisting the prisoner to escape."

See also:

State vs. Beebe, 13 Kan., 589;

People vs. Hochstim, 76 N. Y. App. Div., 25.

Under the authorities it is a necessary element, to constitute the crime of conspiracy for assisting an escape from jail, to prove that the detention was legal. Such being the law, it follows that to charge the crime of conspiring to effect an escape the indictment must allege a lawful detention. It cannot be presumed. The indictment in the case at bar does not allege that Thaw's detention was lawful at the time the conspiracy is charged. So far as anything appears in the indictment he had a right to escape.

But it is suggested that it would not be safe to permit a man confined under process of law to judge his own case and say when his term of detention expired. We admit that to effect an escape under any circumstances is irregular. The person who does it takes his chances of doing an illegal act. In the *Leach* case, above cited, the prisoner took his chance of showing that the statute under which he was committed had been repealed. In the *Houch* case, the prisoner took his chance of showing that the affidavit upon which the process was issued was insufficient in law. The same is true in all of the cases above cited, but in each instance, the question being raised whether the detention was legal, the burden was cast upon the state to show that the prisoner was legally held in custody before it could convict him of the crime of escape. We see no difference between the cases cited and the case at bar.

To convict Thaw of an escape it would have to be alleged and proven that his detention was legal. If he escaped into another state, and the State of New York desired to deport him home for the purpose of completing his term of confinement and such deportation were resisted, the state would have to allege and prove that

his further detention would be legal. We see no distinction between Thaw walking out of Matteawan and a man walking out of jail on the day his sentence expired without permission of his keeper and without a formal discharge. It would hardly be claimed that he could be convicted of breaking jail. While his act would be irregular and perhaps not commendable, the state could not convict him of breaking jail if in fact his sentence had expired, and if he confederated with others to effect his release the minute his sentence expired it would not constitute a conspiracy. *Redman vs. State*, 28 Ind., 205, 214.

The State of New York in the prosecution of its proceedings for extradition must assume either that Thaw was sane or that he was insane. If sane, he has not perverted justice or the due administration of law by refusing further to submit to illegal detention. Now that Thaw is outside of the jurisdiction of the State of New York, before it can again obtain jurisdiction over him, it must satisfy the courts of the asylum state that it is entitled to his return, or, in other words, that he is substantially charged with the commission of a criminal offense. If the presumption of sanity is to prevail, then Thaw's sentence had expired by force of the statute, when his offense of conspiracy is alleged to have been committed. The presumption following insanity we will discuss later.

We do not want to be understood as urging the proposition that it is within the province of the court to determine Thaw's guilt or innocence. It is not the duty of the asylum state to try the accused in extradition matters, but it is the duty of the asylum state to examine into the facts to determine whether a crime is *substantially charged*.

Our position is that whatever acts of confederacy may be proven against him on trial, such acts cannot constitute a crime if he was being confined while sane. This question is raised on the face of the extradition papers. There is no direct allegation contained therein that he was legally held in Matteawan at the time the alleged crime of conspiracy is supposed to have been committed.

But it will doubtless be said that these facts are matters of defense to be urged on trial for conspiracy in the State of New York. It is true that matters of defense in ordinary cases are not considered in extradition proceedings. This case, however, is peculiar in its facts. If the State of New York admits he was sane when he walked out of Matteawan, then on that admission there is no case against him for which he can be extradited. If, on the other hand, it is admitted that he is an insane person who must be kept in confinement, there is no law for extraditing him whatever he may have done. He should be cared for in the state where he is commorant until he can be turned over to his friends and deported to the state of his residence, there to be cared for at their or the state's expense.

The allegations in the indictment, stripped of legal verbiage and boiled down to common English, mean nothing more than that Thaw, aided by others, planned and executed his escape from Matteawan, a state institution for the detention of the insane.

The Penal Code of the State of New York (Section 580) under which Thaw was indicted, provides as follows:

"If two or more persons conspire to do any act injurious to public health, to public morals, or

to trade or commerce, or for the perversion or obstruction of justice, or of the due administration of the laws, each of them is guilty of a misdemeanor."

At the time of the alleged offense, Thaw was not committed for punishment. He had been acquitted of the offense of homicide and his detention was solely for protection. He was not held under any criminal law or civil process, but by a questionable exercise of the police power. "He is entitled to all the privileges of any innocent man." (*Underwood vs. People*, 32 Mich., 1, cited *ante*.)

The state, as a party, was interested in his detention only so far as was necessary for his protection and the protection of its citizens. Such protection would have been sufficient if he had been locked up in a private institution on the application of his friends. If he had walked out of such an institution, committing no crime, making no assault, injuring no one, it would not be claimed that his act was in perversion of justice or an interference with the due administration of the laws. We fail to see the distinction between his being confined in a private institution and his being confined by order of the state in a public institution. The ultimate object of his detention in each case is the same, and the only difference is that in one instance he is ordered confined by a justice of the court in the exercise of a questionable discretion and in the other case he is confined by order of his friends.

The State of New York has deemed it wise to enact laws making it a criminal offense to escape from prison and to aid a prisoner to escape. (Penal Laws, Sec-

tions 1694, 1696), but it has never enacted a law making it a criminal offense to escape from a hospital for the insane. We have found no authority sustaining the proposition that such an escape was a crime at common law. We, therefore, says that Thaw's act of escape was neither *malum in se* nor *malum prohibitum*. Had he escaped unaided by anyone he would have committed no offense against the penal code or the common law. If he was the passive recipient of the efforts of others, he committed no crime. His connection would then be solely with an overt act which, as we have seen, is not in itself a crime. His acts do not come within the meaning of that section of the code, *ante*, under which the indictment was found. This proposition is certainly true if he had become sane and entitled to a discharge.

It is difficult to define the words "perversion or obstruction of justice or of the due administration of the laws." Obstructing justice has been defined as "any obstruction of legal process by active means or by the omission of a legal duty." We have made an extended search for cases that specify the nature of acts that have been held to fall within the meaning of this term. So far as we are able to judge, all of them fall naturally in one of the following classes:

(a) Obstructing or interfering with an officer in the performance of his duty.

(b) Refusing to assist an officer in the execution of process.

(c) Dissuading or preventing witnesses from attending court.

(d) Procuring false evidence.

Conceding everything charged in the indictment and everything intended to be charged therein, Thaw's

acts do not fall within any of these classes. We do not find that the act of escaping from an asylum or aiding in an escape from an asylum has ever been held to fall within this statute or one similar to that under which his indictment was returned. This is at least some evidence that it was not intended to cover a case like the one at bar.

An examination of the English laws as to what acts were included in offenses relating to the administration of justice shows that the common law offenses classified under that heading were, (1) embracery, (2) perjury, (3) subornation of perjury, (4) interfering with witnesses, (5) barratry and maintenance and champerty, (6) conspiracy to obstruct the course of justice, (7) contempt of court.

Under title (6) "conspiracy to obstruct the course of justice," it is said:

> "It is a misdemeanor at common law to conspire together to obstruct, defeat, pervert or prevent the course of public justice, either by bringing a false criminal charge against a man, or by preventing a witness from giving evidence in a criminal prosecution, or agreeing with him that he should not attend at the trial for that purpose, or by publishing matter calculated to interfere with the course of justice or to pervert the minds of the court, or of the jurors, or by producing in court evidence known to be false."
>
> *Earl of Halsbury's Laws of England*, Vol. 9, pp. 228, 500.

From the same authority, it appears (p. 510) that it is made by statute (54 and 55 Vic. c. 69) a criminal

offense for an officer or servant in an asylum for criminal insane to connive to effect the escape of a person confined therein, and a penalty of twenty pounds is imposed on an officer of a non-criminal lunatic asylum for assisting or conniving at the escape of a patient therein.

But, as already said, we have yet to discover any precedent for holding that the lunatic who escapes or connives to effect his escape is guilty of any crime either at common law or by statute.

See also:

People vs. Tompkins, 9 Johns. (N. Y.), 70;
Commonwealth vs. Homer, 5 Met., 555.

Thaw is not a citizen of the State of New York. He is a citizen of the State of Pennsylvania, and always has been. He was not being detained in New York because of the commission of any crime. He was not held for punishment, but for protection. This is what its courts have said. The State of New York has no greater jurisdiction over him than any foreign state, except when it holds him in custody by force, or when he voluntarily enters her territory. New York as a municipal division of the United States has no greater interest in protecting the general public in the United States than has the States of New Hampshire or Vermont. It has no legal duty to perform with respect to Thaw, except when he is within her territory. Such is the effect of the decisions of her courts. Keeping in mind these facts, we say that when Thaw walked out of Matteawan, committing no assault, injuring no property, trespassing on no one's rights, and passed beyond the boundaries of the State of New York, it lost both jurisdiction and legal interest in him. It had performed its duty to the public and to him so long as he

remained in the state. When he was out of it, the burden, if any there were, was cast on the asylum state.

As already said, so far as our investigation has extended, no state has passed a law making it a crime to escape from a hospital for the detention of the insane. The reason is plain. Insane persons are not amenable to the law. They are not held responsible for their acts. A law making it criminal for a lunatic to escape would be ridiculous and contrary to reason. A law punishing them for conspiracy to escape would be more so. We do not believe the conspiracy law of the State of New York ever was or ever will be held applicable to inmates of insane hospitals.

In conclusion of this point, we say the indictment does not charge a crime against Thaw, because it does not allege that his detention was legal at the time it is claimed the crime was committed. It does not allege facts from which such a conclusion can be drawn. The facts stated do not constitute a crime, because Thaw's detention under an unconstitutional statute was illegal and if justified under the police power of the state, it has not been alleged that at the time of his conspiring to escape he was a person dangerous to go at large. If it is said that the order of Justice Dowling made February 1, 1908, which is set forth in the indictment, makes a necessary allegation to supply the above defects, our reply to that contention is that his condition on February 1, 1908, and on August 14, 1913, five years later, may be entirely different. If it is said that a condition of insanity once shown to exist is presumed to continue, then our opponents are coming to our position taken in the last part of this brief that Thaw's status was that of an insane person to whom the extradition laws do not apply.

POINT III.

THE INDICTMENT AGAINST THAW DOES NOT ALLEGE A CONFEDERACY TO COMMIT AN UNLAWFUL OVERT ACT OR A CONFEDERACY TO COMMIT A LAWFUL ACT BY UNLAWFUL MEANS.

It is alleged in the indictment (p. 120) that Harry K. Thaw with others

> "did unlawfully, fraudulently and maliciously conspire, combine, confederate and agree together between and among themselves and with divers other evil-disposed persons to the grand jury aforesaid as yet unknown, illegally and fraudulently to cause and procure the said Harry K. Thaw to escape from the said hospital, and illegally to go at large by such dishonest, corrupt, fraudulent, deceitful and illegal means, methods, devices and practices as they should thereafter deem available to the great and manifest perversion and obstruction of justice and to the due administration of the laws."

These are high-sounding words, but when analyzed they are nothing but words. It will be noted that the parties are alleged to have conspired "by such dishonest, corrupt, fraudulent, deceitful and illegal means, * * * as they should thereafter deem available," but nowhere is it stated what the *means* were that the court may judge whether in fact they were illegal and of themselves constituted a crime. The indictment sets forth nothing but conclusions. (*People vs. Hubbard*, 141 Mich., 96.)

While we admit that interstate extradition does not require that an indictment should be drawn with the nicety of common law criminal pleading and that the fact that an indictment is in form demurrable is not fatal, yet there must be something approaching a legal form of indictment. We apprehend that the charge in form "We the grand jury, etc., do charge Harry K. Thaw with the crime of conspiracy" would be fatally defective. A crime *substantially charged* means at least some approach to a legal indictment. The proposition is sustained by the language of Mr. Justice Moody in the case of *Pierce vs. Creecy*, 210 U. S., 387, in which it is said:

> "But the constitution does not require, as an indispensable prerequisite to interstate extradition, that there should be a good indictment, or even an indictment of any kind. It requires nothing more than a charge of crime. * * * But it is obvious that an objection which, if well founded, would destroy the sufficiency of the indictment, as a criminal pleading, might conceivably go far enough to destroy also its sufficiency as a charge of crime. * * * This court, in the cases already cited, has said, somewhat vaguely but with as much precision as the subject admits, that an indictment, in order to constitute a sufficient charge of crime to warrant interstate extradition, need show no more than that the accused was substantially charged with crime."

See *Re Waterman*, 11 L. R. A. (N. S.), 424;
Barriere vs. The State, 142 Ala., 72;
In re Tod, 12 S. D., 386;
Smith vs. The State, 21 Neb., 552;
Ex parte Rowland, 35 Tex. Crim. Rep., 108;
Ex parte Lorraine, 16 Nev., 63.

Our attention has not been called by our opponents or in our own investigation to any case which holds that requisition papers wherein the indictment does not substantially set out a crime to furnish the foundation for an extradition warrant. Our position is that the indictment in the case at bar does not set out a crime at all. Let us apply the law to the indictment under consideration. A conspiracy is defined to be a confederacy to do an unlawful act or a lawful act by unlawful means. (*State vs. Burnham*, 15 N. H., 396, 402.) It is separable into two parts, namely, the *confederacy* and the *overt act*. In cases where the overt act does not constitute a crime, the *means* by which it is to be accomplished must be shown to be criminal. The overt act was Thaw's escape from Matteawan, but as we have seen this was not in itself a crime. This is practically conceded by the fact that our opponents do not urge it as an offence and have not indicted him for such an offence.

In the case of *State vs. Parker*, 43 N. H., 83, which was an indictment for a conspiracy to cheat and defraud, Bell, C. J., said:

> "It has been decided that the words 'cheat and defraud' unexplained do not necessarily import anything forbidden by law, or unlawful, because there are certain cheats and frauds, properly so denominated in the language of ethical writers, and in conversation, which the law excuses and does not condemn. So it has been held that an indictment which charges a conspiracy to cheat and defraud another of his money or goods without describing the *mode of effecting the fraud, or the concerted means of carrying it into effect*, does not describe an unlawful act, and is consequently defective and insufficient."

In the case of *State vs. Potter*, 28 Ia., 551, which was an indictment for conspiracy, the language of the indictment follows closely the form of the indictment in the case at bar. The court says:

> "The indictment charges the offence in the following words: 'That said Franklin and Potter, etc., unlawfully and feloniously, did conspire and confederate together, with a fraudulent intent to do an illegal act, injurious to the administration of public justice, to wit; did conspire and confederate together, with the said intent, to defeat the enforcement of the prohibitory liquor law, so called, in said county, wrongfully, to wit; with money and other unlawful means, to prevent the grand jury of said county from finding and presenting bills of indictment for violation of said prohibitory liquor law contrary, etc., * * * It will be observed that the *means* of doing the act set out in the indictment are not sufficiently described to make them appear unlawful. * * * It is not shown to be of itself criminal, nor is it avowed to be unlawful. The means of doing this act under the combination is averred to be with money or other unlawful means. This is not sufficient. It should have set out the manner in which the money was to have been used, and should have specified the other means from which it might appear that the acts intended are, in fact, illegal."

The case of *State vs. Stevens*, 30 Ia., 391, was an indictment for conspiring to injure the character of one Stevens. We quote the following from the language of the court:

> "It has been settled by this court, after a full examination of the English and American authori-

ties, that an indictment for conspiracy must show on its face that the *object* of the conspiracy is a *criminal* one, or else, if the purpose thus disclosed does not import a crime, then other facts should be alleged and set forth, so as to show that the *means* to be employed are *criminal.*"

In *State vs. Jones,* 13 Ia., 269, Lowe, J., says:

"In the states of Maine, New Hampshire, Massachusetts, Vermont, New York, New Jersey and Pennsylvania, it has been settled that a general charge of a conspiracy to effect an object not criminal, is not sufficient, and that a charge of such a conspiracy is to be accompanied with the further statement of the *means* agreed to be used to effect the object, and those *means* must appear to be criminal."

In *State vs. Roberts,* 34 Maine, 320, it is said:

"The purpose, which was the object of the conspiracy, as alleged in the third count, not being criminal in itself, if there is any offence charged, it must consist in the means designed to be employed. *These must be specifically stated.*"

In the case of *Commonwealth vs. Shedd,* 7 Cush., 514, it is held that

"An indictment for a conspiracy to cheat and defraud, which does not set forth the *means intended to be used,* is insufficient, and is not aided by averments of overt acts done in pursuance of the conspiracy."

In the case of *Commonwealth vs. Hunt,* 4 Met., 112, 125, Chief Justice Shaw of Massachusetts has stated the law perhaps as clearly as it can be stated. He says:

> "And it follows, as another necessarily legal consequence, from the same principle, that the indictment must—by averring the unlawful *purpose* of the conspiracy, or the unlawful *means* by which it is contemplated and agreed to accomplish a lawful purpose, or a purpose not of itself criminally punishable—set out an offense complete in itself, without the aid of any averment of illegal acts done in pursuance of such agreement; and that an illegal combination, imperfectly and insufficiently set out in the indictment, will not be aided by averments of acts done in pursuance of it."

One of the leading cases in point is that of *Lambert vs. The People,* 9 Cow., 578. We take this to be not only one of the leading cases of the country, but the leading case on the subject in the State of New York. It was there held that

> "Where the indictment for a conspiracy does not set forth the object specifically, and show that such *object* is a legal crime, it should particularly set forth the means intended to be used by the conspirators, and show that the *means* are criminal; otherwise, it charges no crime which the law can notice."

On page 32 and 33 of Appellant's brief, it is said:

> "No one, we believe, can with propriety contend that the acts charged were other than a perversion or obstruction of justice or of the due administration of the law."

We are not prepared to admit the truth of this proposition. The overt acts alleged in the indictment are correctly construed by the Appellant on pages 58 and 59 of his brief. The overt act charged in the indictment is not a perversion or obstruction of justice or of the due administration of the laws.

We find on page 58 of the Appellant's brief this statement:

> "In the case at bar it may be conceded that the overt acts alleged are not criminal or even *unlawful,* without touching the question under discussion."

Also we find on pages 58 and 59 of the Appellant's brief:

> "It is not claimed that the indictment charges a crime because the conspirators designed to use means, in themselves and taken alone, criminal or even unlawful."

If the overt act charged in the indictment was neither criminal nor unlawful, and if the means used as alleged to accomplish the overt act were not in themselves criminal or unlawful, then the charge of conspiracy to pervert and obstruct justice and the due administration of the laws is not sustained by the overt act.

If the subject of conspiracy was neither criminal nor unlawful, and if the means used to accomplish it was neither criminal nor unlawful, then how can a charge of conspiracy to pervert and obstruct justice and the due administration of the law be sustained?

There is no law in the Penal Code of New York making it a crime or a misdemeanor to escape from an insane asylum. There is no law in the Penal Code of New York making it a crime or a misdemeanor to aid a person to escape, nor to aid a person after he has escaped from an insane asylum, nor is there any law making it a crime or mindemeanor to conspire to escape or to aid a person to escape from an insane asylum. Finding no law prohibiting the things charged in the overt act, they hook onto this provision in the Code making it a misdemeanor to conspire to pervert and obstruct justice and the due administration of the law, and then allege that justice is perverted, or sought to be, by doing something that is neither a crime nor unlawful. Of course it is easy to understand what was meant by the legislature declaring it a crime to conspire to pervert and obstruct justice or the due administration of the law, but it never was intended that two persons could conspire to pervert and obstruct justice and the due administration of the law by doing something which the law does not forbid and which they admit in plain words it does not forbid. In the absence of specific legislation two persons cannot be guilty of conspiring to do a thing which they can do lawfully as individuals.

The case of *Pettibone vs. United States*, 148 U. S., 197, is strongly in point. In the opinion written by Chief Justice Fuller, the case of *Commonwealth vs. Hunt, ante*, is cited with approval and some of the language of Chief Justice Shaw is quoted and adopted. The case forcibly lays down the law, that in indictments for conspiracy to impede the due administration of the law, if the overt act is not unlawful, the *means* to be

employed must be shown to be unlawful, else the indictment does not charge a crime.

It further decides that,

> "A person is not sufficiently charged in such case with obstructing or impeding the due administration of justice in a court, unless it appear that he knew or had notice that justice was being administered in such court."

In this connection, we want to inquire how many inmates of insane institutions know and realize that in their detention the law is being administered and how many realize that if they escape they are impeding justice. We believe not one could be convicted under the decision in the *Pettibone case.* To our minds Thaw's detention at Matteawan was more in the nature of police restraint than a restraint under the strong arm of the law.

The general conclusion to be deduced from the foregoing authorities and numerous others which might be cited is that when the object of the conspiracy in itself is neither *malum in se* nor *malum prohibitum* the illegality of the means used must constitute a crime and such illegal means must be so definitely set forth that the court can see that they are in themselves illegal. Measured by the standard of the foregoing cases, the indictment attached to the extradition papers is fatally defective.

It is alleged that Thaw conspired to escape by "such dishonest, corrupt, fraudulent, deceitful and illegal means *as they should thereafter deem available.*" Up to this point in the indictment no crime is charged

against anyone. Evidently Thaw stopped there, because it is not alleged that he at any time afterwards took part in devising any illegal means of escape. The means afterwards devised for anything that appears in the indictment may have been a legal means. If the others afterwards conceived the scheme of carrying him off in an automobile, it does not appear that Thaw confederated with them in their plans. The fact that he was the willing or passive recipient of their scheme —that he was a party to the overt act—does not make him guilty of conspiracy, the overt act not being in itself a crime. It seems to us that the allegations in the indictment so far as they implicate Thaw fall squarely within the rule laid down by Chief Justice Shaw in the case of *Commonwealth vs. Hunt*, cited *ante*.

We are aware of the fact that under the Code of Criminal Procedure adopted in the State of New York it is no longer necessary to frame an indictment with such certainty as was required at common law, and it is now held that an indictment is good if it contains sufficient averments to inform the defendant of the nature of the accusation against him and enable him to prepare his defence and when the record may be admitted as a bar to a second prosecution for the same offence. (*People vs. Willis*, 158 N. Y., 392). But measured by the standard in this case, the indictment is defective because Thaw confined as he was in Matteawan and presumed to be innocent until proven guilty can get no knowledge whatever from the indictment of the means which the state claims was agreed to be employed to effect his release.

It is alleged that the confederacy took place in New York City. To go there, with the knowledge given

to the respondent by the indictment, to hunt up evidence to prepare his defense would be like hunting for a needle in a hay mow. There is not a word or sentence in the entire indictment which would aid him in his preparation. *Neither is there anything in this indictment which could be definitely pleaded in bar to another indictment alleging conspiracy to escape by means of bribing or assaulting an attendant.* Keeping in mind that the gist of the action of conspiracy is confederacy and that when the overt act is not in itself illegal, the illegal means must be averred and proven, we say that the indictment attached to the requisition papers does not substantially charge a crime.

POINT IV.

AN INSANE PERSON CANNOT BE SUBSTANTIALLY CHARGED WITH A CRIME WITHIN THE MEANING OF THE EXTRADITION LAWS.

This branch of the discussion presents the question whether the federal statutes authorizing interstate extradition apply to insane persons. This question is fairly raised in the record in the case at bar. The indictment alleges (p. 119-20) Thaw's commitment as an insane person to the Matteawan State Hospital by Justice Dowling. It alleges that Matteawan State Hospital is an institution for the detention of insane persons (p. 120). It alleges his detention there on the fourteenth day of August, 1913, the date of the alleged conspiracy, and it alleges his escape from the institution on the seventeenth day of August, 1913 (p. 121).

Speare on the Law of Extradition, p. 288, in his analysis of the provisions of the constitution, says:

> "The term "*person*," as here used, means any human being belonging to either sex, and of such age and mental capacity as to be legally answerable for his or her conduct, whether a citizen or not, of whom the recitals descriptive of such person hold true. These recitals show very clearly that irresponsible infants, lunatics, and idiots, though persons, are not included in the phrase "*a person*" as here employed. Such persons are not legally capable of committing a crime, and are not dealt with as offenders against the laws of civil society. The provision has no application to them."

The reason for holding that the term "person" does not apply to infants, lunatics and insane persons is well stated and must appeal to any judicial mind as founded upon reason and common sense.

Our attention has been called to certain sections of the Criminal Code of the State of New York and cases interpreting the same. We see nothing in these laws or in the cases cited except re-enactments of the rules of the common law. It is, generally speaking, true that every person is presumed sane and capable of understanding the nature of his acts until he is proven insane. It is also, generally speaking, true that insanity is a defense in criminal cases that must be taken advantage of, if at all, by the respondent. Our attention is especially called to Section 815 of the Penal Code of the State of New York, which is as follows:

> "A person is presumed to be responsible for his acts. The burden of proving that he is irresponsible is upon the accused person except as otherwise provided in this chapter."

The first sentence of the statute referred to affirms the common law presumption that every person is presumed to be responsible for his acts. But this is only a presumption, and like any other presumption it may be overthrown by evidence. It appears upon the record that Thaw had been prior to the date of the alleged conspiracy adjudged insane and irresponsible for his acts. It appears that he had been committed to the Matteawan asylum there to remain until sane. It appears that he was still confined at the time that it is alleged he committed the crime of conspiracy. These facts appearing in the record would seem to be sufficient to overthrow the mere presumption of sanity mentioned in Section 815 of the Penal Law above quoted. The remainder of the section provides that the burden of proving irresponsibility is upon the accused. This is a rule of evidence that makes it incumbent upon the respondent in criminal actions to assume the initiative and in the first instance satisfy the court that the presumption of responsibility should not prevail. But when that presumption is once overthrown, then the burden shifts onto the state to show beyond a reasonable doubt that the accused had sufficient reason to know the nature and quality of his act and to know it was wrong.

In the case at bar the admissions contained in the indictment to which attention has already been directed, taken in connection with Thaw's several trials on writs of *habeas corpus* referred to in the record (p. 69) and published in the official reports of the courts of New York [*People ex rel. Peabody vs. Baker*, 59 Misc. Rep., 359 (decided 1908); *People ex rel. Peabody vs. Chanler*, 133 N. Y. App. Div., 159 (decided June 4, 1909); *People ex rel. Thaw vs. Lamb*, 118 N. Y. Supp., 389 (decided August, 1909)], furnishes ample evidence to rebut the

presumption of "responsibility" mentioned in Section 815 of the New York Penal Code cited *ante*.

The foregoing evidence is reinforced by the presumption that insanity once shown to exist is supposed to continue until the contrary is shown. The rule is well stated in *Greenleaf on Evidence*, Vol. 1, Sec. 42, as follows:

> "In like manner, every man is presumed to be of sane mind, until the contrary is shown, but, if derangement or imbecility is proved or admitted at any particular period, it is presumed to continue, until disproved, unless the derangement was accidental, or caused by violence or disease."

Cases in point are:

State vs. Spencer, 1 Zab., 196;
State vs. Wilner, 40 Wis., 304;
People vs. Francis, 38 Cal., 184, 189;
Armstrong vs. The State, 30 Fla., 170, 204;
Langdon vs. The People, 133 Ill., 382;
State vs. Schaefer, 116 Mo., 96;
Wheeler vs. The State, 34 Ohio St., 395;
Lawson on Presumptive Evidence, p. 180.

Wharton's Criminal Law, 11th ed., p. 106, says, with reference to the finding of an inquisition of lunacy:

> "The finding of an inquisition of lunacy which is admissible shifts the burden."

See also *Cook vs. Cook*, 53 Barb., 180;
Hughes vs. Jones, 116 N. Y., 67, 72.

We cite the foregoing authorities to show that the rule in the State of New York and the generally accepted law is that when insanity is once judicially es-

tablished, it is presumed to continue and the burden of proving sanity shifts to the party alleging it.

We are simply invoking against the State of New York the same rule that it invoked against Harry K. Thaw in the case of his appeal. (*People ex rel. Thaw vs. Lamb*, 118 N. Y. Supp., 389, 392.) It is there held that the State of New York by committing Thaw to the Matteawan State Hospital has shifted the burden onto him to prove his sanity, if he applies for a release. Justice Mills, speaking of the prior adjudication of the jury in Thaw's trial for homicide, says:

> "It seems equally clear that the natural presumption of fact follows that such condition of insanity has continued to the present time. The effect of such presumption is to cast upon the prisoner here the burden of proving that since the commission of the homicide he has become sane to the degree that it is reasonably certain that his enlargement now will be without menace to the public peace or safety."

If the State of New York casts the burden upon Thaw to prove himself sane in order to be released from Matteawan, it is only invoking the same rule to say that the state should assume the same burden if it wants to prove him sane. This it must do before it has any right to extradite him. It must allege in the indictment and prove that he is capable of committing the crime charged before it can establish that he is substantially charged within the meaning of the extradition laws. It must overcome the presumption that naturally follows his status at the time the alleged crime was committed. It cannot extradite a man who cannot commit a crime.

As already stated, the rule prevailing in the State of New York in criminal cases is that the presumption of sanity having once been overcome by some proof of insanity, the burden shifts and the state must show that the accused is responsible for his acts beyond a reasonable doubt. This is the rule that obtains under the present statutes in that state. In the case of *People vs. Egnor,* 175 N. Y., 419, decided in 1903, this precise question was involved. Egnor was indicted for murder. The trial judge charged the jury as follows:

> "The law presumes that a man is sane and responsible for his acts. The presumption of the law is that on the ninth of January, 1901, at the time of the killing of Archibald Benedict, the defendant was sane and responsible for his acts. *The defendant is not bound to satisfy you that he was insane at the time beyond a reasonable doubt, but he must overcome the legal presumption of his sanity.* After he has given evidence tending to show that he was insane, then that presumption is rebutted and the prosecution must prove his sanity at the time by a fair preponderance of credible evidence in the case. * * * I charge you that the duty is upon the people to satisfy you as to the sanity of the defendant by a preponderance of the evidence, but, in considering that evidence, if you have any reasonable doubt as to the defendant's sanity, at that time, he should be acquitted upon the ground of insanity."

Upon consideration of this charge by the Court of Appeals, it was held that taking the whole charge together it was sufficient. Gray, J., in delivering the opinion of the court, says, however:

> "If what was charged was subject to the objection that it dispensed with the necessity on the part

of the prosecution to prove defendant's sanity beyond a reasonable doubt, it was erroneous."

This case was decided under the present existing statute of the State of New York. It would seem, therefore, that after the respondent had once adduced evidence of insanity that it was incumbent upon the state to show his sanity beyond a reasonable doubt in order to warrant a conviction.

This is likewise the rule in the State of New Hampshire. In the case of *State vs. Pike,* 49 N. H., 399, the court, referring to certain instructions given the jury, says:

> "Every person of mature age is presumed to be sane, until there is evidence tending to show insanity, but when there is evidence coming from either side tending to show insanity, then the state must satisfy the jury beyond reasonable doubt that the prisoner is sane."

It was held that the charge correctly stated the law.

See also *Brotherton vs. The People,* 75 N. Y., 159; *Walker vs. The People,* 88 N. Y., 81.

In the case at bar the record shows that Thaw was insane. There is no evidence or allegation rebutting the presumption which necessarily follows. The extradition papers contain no allegation of sanity. It is not set forth that the alleged crime was committed in a lucid interval. The presumption which naturally follows from the admitted facts establishes insanity in law. Any other conclusion would be doing violence to the evidence before the court. We therefore submit that upon the record Thaw could not be guilty of the crime of conspiracy.

We confidently assert that no law or precedent exists for the interstate extradition of an insane person. Such unfortunates are dealt with in other ways. The fact that no precedent exists when it is a matter of common knowledge that hundreds of insane persons escape from hospitals every year, furnishes strong argument that they are not amenable to the extradition laws.

The only attempt to extradite an insane person who had escaped from an asylum for the insane, which has come to our attention, is the case of Amelia Leonard of Massachusetts, who fled to New York and who was demanded by the Governor of Massachusetts from the State of New York upon extradition proceedings. A writ of *habeas corpus* was sustained by Judge Seabury, and the petitioner was discharged as not being an extraditable person. We are not aware of any official report of this case except as it is found in the records of the court in New York City. The case is referred to in the opinion of Judge Aldrich (p. 220). A certified record of the proceedings was furnished in the lower court.

In conclusion of this point, we say that the relator is at liberty to take advantage of such admissions in the indictment and such other portions of the record as are material to overcome the presumption of sanity mentioned in Section 815 of the New York Penal Code. It does not matter from which side evidence comes in a case so long as it appears. Either side can have the benefit of it for what it is worth. The burden is cast on the State of New York to allege in the indictment and show that Thaw was capable of committing crime. Because there is no such allegation in the indictment, that instrument does not *substantially charge* a crime within the meaning of the extradition laws.

II.

IS THE ACCUSED A FUGITIVE FROM JUSTICE?

Point V. Evidence may be considered to determine whether the relator is a fugitive from justice.

Point VI. If the accused is not a fugitive from justice, there is no jurisdiction to extradite. Sanity is a jurisdictional fact.

POINT V.

EVIDENCE MAY BE CONSIDERED.

The relator was entitled to introduce evidence on the question of whether or not he was a fugitive from justice. He is also entitled to have such facts and admissions as appear in the record considered for the same purpose.

In the case of *McNichols vs. Pease,* 207 U. S., 100, 109, Mr. Justice Harlan says:

> "One arrested and held as a fugitive from justice is entitled, of right, upon *habeas corpus,* to question the lawfulness of his arrest and imprisonment, showing by competent evidence, as a ground for his release, that he was not, within the meaning of the constitution and laws of the United States, a fugitive from the justice of the demanding state, and thereby overcoming the presumption to the contrary arising from the face of an extradition warrant."

The case of *Bruce vs. Rayner,* 124 Fed., 481, is also in point. That was a case wherein the relator was held on an extradition warrant issued by the Governor of Maryland in response to a request of the Governor of New Jersey. The crime charged was bigamy committed in the State of New Jersey. By the laws of that State the crime was barred by a two years' statute of limitation. It was held that it was competent for the relator to show in his proceeding for a discharge on a writ of *habeas corpus* that he remained in the State of New Jersey without being concealed for more than two years after the crime was committed before leaving the state and therefore by leaving the state he did not become a fugitive from justice.

Simonton, C. J., writing for the Circuit Court of Appeals, in referring to the case of *Roberts vs. Reilly,* 116 U. S., 94, says:

> "But the learned judge delivering the opinion treats the conclusion of the governor as *prima facie* and presumptively correct only until such presumption is overthrown by contrary proof. To the same effect is *Ex parte Reggel,* 114 U. S., 653. Both of these cases go into an examination of the facts, and coincide in the conclusion of the governor. A fugitive from justice is one who, having committed a crime within a state, either conceals himself within the state or departs therefrom so that he cannot be reached by ordinary process. Therefore, in determining whether he be delivered on the demand of the state in which he is charged with crime, it must appear not only that he was properly indicted; it must also appear that he was within the state when the crime charged was committed, and also that he had concealed himself,

or had absconded, so that he could not be reached by ordinary process. *Ex parte Reggel*, 114 U. S., 651, 652. So it would seem that the question of fact is always open to inquiry. The mere requisition of the governor of the demanding state cannot be accepted as conclusive of the facts, else the accused person may be remanded, notwithstanding incontestable proof that he had never been within the state whose executive is demanding him. It is clear, therefore, that this fact is open to proof and examination. And if one fact which constitutes the term 'fugitive from justice can be inquired into, why should not the other facts, equally necessary, be also inquired into?"

In the case at bar the admissions appearing in the indictment and the facts and circumstances appearing in the record and not denied by the appellant may be considered in determining whether the relator is a fugitive from justice within the intent of the federal extradition laws. We have already referred to such admissions and facts and will not repeat them.

POINT VI.

Insanity a jurisdictional fact.

Heretofore we have discussed the question of insanity from a different viewpoint with reference to its effect on the question of whether Thaw is substantially charged with a crime. We have said that being adjudged insane on February 1, 1908, his insanity is presumed to have continued up to August 17, 1913, nothing to the contrary being shown. We do not recede

from that position. But upon a more critical examination of the case we are convinced that our position is stronger than that. The fact appearing on the face of the indictment that Thaw was detained in Matteawan when the crime of conspiracy is alleged to have been committed, it amounts to an admission that he was insane, and so insane as to be dangerous to be at large else justice was not being administered in keeping him there. The question of Thaw's sanity is jurisdictional in extradition proceedings. *The admission in the indictment that he was insane at the time the alleged crime was committed is destructive of jurisdiction under the federal constitution and laws authorizing extradition.*

It is axiomatic that Thaw should be discharged on the writ of *habeas corpus*, if he is not a "person" within the meaning of the extradition laws. If he is not amenable to the criminal law, there is no authority for holding him. The question of jurisdiction is one that ought not to be thrown into the realm of doubt on the face of the papers. It should be made certain.

Counsel for the State of New York urge the position that Thaw's sanity or insanity—his responsibility or irresponsibility—for the crime alleged against him are matters of defence to be determined at his trial in New York. It is true they may be so urged, but the question strikes deeper than mere matters of defence on trial. *They are questions that must be settled before it can be determined that there is jurisdiction to extradite him.*

We start with the admission of the State of New York that Thaw was insane when the crime was com-

mitted. Therefore, the presumption follows that he is not a "person" within the meaning of the extradition laws. The court may indulge the presumption of sanity in cases where it is proper; it may indulge the presumption of insanity in certain cases; but we have never known of any intermediate presumption in law. A man is presumed to be either sane or insane.

Sanity being a jurisdictional fact, to say it might be proved on trial in New York that Thaw was sane enough to understand the nature and quality of his conspiracy act and know that it was wrong, does not satisfy the jurisdictional requirements of the federal constitution. It only throws the question of jurisdiction into the realm of doubt. In all criminal proceedings the accused is entitled to the benefit of the doubt. Jurisdiction must be certain before the court will permit a person to be carried from one state to another there to be put on trial for his life or liberty in a criminal action.

In the case of *Ex parte Smith*, 3 McLean's Rep., 121, 136, the court says, with respect to extradition:

> "No case can arise demanding a more searching scrutiny into the evidence than in cases arising under this part of the constitution of the United States."

That the petitioner is the Harry K. Thaw who escaped from Matteawan State Hospital in the State of New York on the seventeenth day of August, 1913, is not denied, but that an insane person can be a fugitive from justice is denied. A person who is insane cannot commit a crime. To become a fugitive from justice a person must have committed a crime. This proposition is elementary and proves itself. The law neither does

not contemplate the doing of useless things. One who is immune from conviction for a crime in the eye of the law cannot be charged with that crime. As *justice* cannot reach him in the state where the act was committed, it cannot be said that by going into another state he has fled from *justice*.

The conclusion of this point is that upon the face of the papers the only legal presumption that can be entertained is one destructive of the jurisdiction to extradite.

III.

IS THE REQUISITION SOUGHT FOR ANY ULTERIOR PURPOSE?

Point VII. Abuse of Process.
Point VIII. Misuse of Process.

POINT VII.

We are aware of the fact that there are many cases holding that the question of good faith is not open to consideration either by the executive of the asylum, state, or upon the writ of *habeas corpus* brought by the accused. There are, however, many authorities in opposition that hold that such questions are open for consideration. Some of these authorities have already been referred to in the early part of this argument. The question of good faith is so often considered that we believe there can be no positive rule of law against it. It

is said in *Church on Habeas Corpus* (2nd Ed.), Section 474, p. 828:

> "A fugitive criminal can only be delivered up upon formal requisition of the governor of the state, in compliance with the constitutional provision. The fact that the alleged fugitive has been arrested, and is detained by the order of the court, does not of itself give any executive jurisdiction over the case. The court has no power to deliver up the prisoner, and no executive has the power until the executive of some other state or territory has, by a demand, furnished the necessary conditions. But the duty of making a surrender is not absolute and unqualified even when all the papers are in due form. It is dependent upon the circumstances of the case. The requisition must be made in good faith according to the letter and intent of the constitution and the law and not in violation of the spirit and design of both. And the governor, upon whom demand is made, has the right, even when all the papers are technically correct to inquire whether the requisition is made for a different purpose from the one named in the constitution. In such a case the executive will exercise his discretion in refusing to comply with the request."
>
> See also *Spearc on Extradition*, pp. 424, 425.

As all material questions relating to extradition, proper for the consideration of the governor of the asylum state, are open to review in the courts, we see no reason why the court as well as the governor may not look beyond the bare record, receiving evidence if necessary, for the purpose of determining whether the requisition is sought for any ulterior purpose in violation of the letter and spirit of the constitution and laws.

The United States Constitution provides that no person shall be deprived of his life, liberty or property without due process of law. It cannot be said that a person is accorded due process of law under the constitution if he is surrendered to the demanding state on a pretext when the real purpose for demanding him is something foreign to the matters set out in the extradition papers. Such an act would be in violation of the spirit and intent of the constitution.

"Good faith consists in an honest intention to abstain from taking any unconscious advantage of another, even through the forms or technicalities of law." If the purpose of this requisition is to return Thaw to Matteawan, it is not in good faith. If it is procured and pressed for private reasons at the instance of individuals, it is not for public reasons, and therefore is not in good faith. To extradite a person for a simple misdemeanor involving no moral turpitude for the purpose of obtaining jurisdiction of his body to lock him up in a madhouse, is making a football of the constitution for the perversion of justice. This is not the spirit or intent of the extradition laws. It makes no difference whether the demand is made by a sovereign state or its humblest citizen. The United States Constitution is over and above them all and all must obey it.

The fact that the state is seeking to assume a burden for so trivial an offense opens the door of suspicion. Under the law in the State of New York, Thaw could be deported to his home state (Pennsylvania). *Birdsey's Cummings & Gilbert's Consolidated Laws*, Vol. 9, p. 234.

The fact that Thaw has been kept in the Matteawan State Hospital for five and a half years creates a nat-

ural suspicion that there is still a lurking desire to punish him for the crime of homicide of which he was acquitted. If such is the fact, as we believe it is, we want again to quote from the decision of Judge Campbell in the case of *Underwood vs. The People,* 32 Mich., 1, where he says: "Having been acquitted, he is entitled to all the privileges of any innocent man." Public policy would require the board of commissioners to deport Thaw to his home state, there to be cared for as other insane persons, if such care is necessary.

Admissions of counsel in the record (p. 165) show that the ultimate purpose of this proceeding is to return Thaw to Matteawan. There was other evidence presented in the District Court tending to the same conclusion. With other evidence Judge Aldrich had before him a copy of a bill for the purpose of defraying the expenses of this litigation, which was introduced in the New York Senate on March 17, 1914. The bill was introduced by request. It may be fairly presumed that it was by request of some person or persons interested in obtaining their pay for service rendered in connection with Thaw's extradition.

The case of *McNichols vs. Pease,* 207 U. S., 100, 109, already referred to, holds that evidence is admissible to show that the relator is not a fugitive from justice.

Judge Aldrich, in the District Court, found (p. 223) that the sole purpose of this proceeding is not to punish Thaw for the supposed crime of conspiracy, but to return him to Matteawan. He has also found that on the evidence before him Thaw is not a fugitive from justice within the meaning of the extradition laws. So

far as these findings are questions of fact depending upon the evidence before Judge Aldrich, they are conclusive.

The bill referred to is printed at length on the following page:

"STATE OF NEW YORK.

No. 1421. Int. 1201.
In Senate.

March 17, 1914.

"Introduced by Mr. Frawley—(by request)—read twice and ordered printed, and when printed to be committed to the Committee on Finance.

An ACT

"Making an appropriation for the expenses incident to the custody and the proceedings to procure the return to Matteawan State Hospital of Harry K. Thaw, occasioned by his escape therefrom.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The following sums, or so much thereof as may be necessary, are hereby appropriated out of any money in the treasury, not otherwise appropriated, for the purposes hereinafter specified, payable by the treasurer, upon the audit and warrant of the comptroller, on vouchers approved by the attorney-general:

For the payment of counsel, attorneys, detectives, sheriffs, constables, stenographers, printing, traveling and other expenses incurred in behalf of the State of New York incident to the apprehension, and in procuring the return, of Harry K. Thaw, to

the Matteawan State Hospital, occasioned by his escape from said institution, the sum of forty-three thousand six hundred and fifteen dollars and two cents ($43,615.02).

For the compensation of Amos T. Baker, medical expert, for services as an expert witness in behalf of the State of New York incident to the proceeding entitled 'The People of the State of New York, ex rel. Mary C. Thaw, against John W. Russell, medical superintendent of Matteawan State Hospital,' the hearings of which were held at New Rochelle and White Plains in nineteen hundred and twelve, the sum of seven hundred and forty-five dollars ($745).

2. This act shall take effect immediately."

Whether this became a law or not we have not been informed. Never in the history of criminal procedure so far as we know has so much money been spent for the purpose of securing the return and conviction of a person charged with a bare misdemeanor. The offence charged is not a misdemeanor involving moral turpitude. It is not a conspiracy to do injury to others or to defraud others or injure the public or defraud the public. It cannot be possible that there is any public demand, sentiment or feeling that would countenance the expenditure of so much money to convict one of such a misdemeanor. Ever since Thaw's escape from Matteawan, he alone of all the conspirators has occupied the center of the stage. The facts disclosed in the record, and the act of the New York Senate, leave an abiding conviction in our minds, as we think they must in the minds of the court, that the real reason underlying the form of the extradition proceedings is the desire to return Thaw to Matteawan. The attempt to extradite Thaw on the charge of conspiracy was first prompted by

such an idea, and these proceedings are a subterfuge devised for the purpose. The requisition for a conspiracy was adopted from necessity and not from choice. If Thaw is rendered to the State of New York, his ultimate home will be the Matteawan State Hospital. These circumstances present a matter for the serious consideration of the court. The question is broader than that of mere comity. It is a question of whether the spirit and intent of the constitution and the laws of the United States shall be violated.

We quote from the opinion of Campbell, Judge, concurred in by Cooley, Judge, in the case of *In re Cannon,* 47 Mich., 481:

> "We do not think the considerations involved in this inquiry have any especial connection with state pride or state comity. The State of Michigan has no legal power to demand, and the State of Kansas has no legal power to deliver up, any person but those charged as fugitive criminals. The constitutional safeguards on this subject concern the individual's liberty and not merely the state's dignity, and no one holds his liberty subject to state comity or on any less tenure than constitutional right. * * * If the requisition had been made for an expressly fraudulent purpose, and with no expectation of prosecution for the crime which was its pretext, we do not think any department of the government could sanction such a use without the plainest perversion of justice. No ingenious reasoning could remove from such a transaction the disgrace which no decent commonwealth could afford to incur."

In the conclusion of this point, we say that if the court is convinced from the entire record that this pro-

ceeding is instituted for a purpose other than appears on the face of the papers, it furnishes another reason why the ruling of the District Court should be sustained.

POINT VIII.

MISUSE OF PROCESS.

If Thaw's extradition is sought for an ulterior purpose, it is an abuse of process. If the State of New York has mistaken its remedy, it is a misuse of process. In either case extradition should be denied.

The case of *Pooley vs. Whetham,* 15 L. R. Chan. Div., 435 (1880), was one arising under the Extradition Act of 1870 in England. It was claimed that extradition was being used to subserve private ends. James, L. J. (p. 441), says:

> "Of course if that were so, if anything of that kind amounting to an abuse of process of the court were resorted to, independently of any Extradition Act or any other act in the world, we should not have had the slightest hesitation in discharging him from the attachment which had been so obtained, as we should from an attachment obtained through any other fraud."

It is an anomalous, dual position for a state, a self-appointed guardian, to occupy,—that of prosecutor in extradition proceedings and guardian of the insane person sought to be extradited. We have always considered the duties of a guardian to be those of a protector and not a prosecutor. We have made diligent search and have found no precedent, English or American,

authorizing the return of an escaped lunatic as a fugitive criminal. In England, Scotland and Ireland, the matter is set at rest by an independent statute (53 & 54 Vict., c. 5) separate and apart from their Fugitive Offenders' Act.

Earl of Halsbury's Laws of England, Vol. 19, p. 525.

See also *In re Maltby*, 14 Cox's Cr. L. R., 609.

The fact that the return of escaped lunatics is provided for by statute other than the Fugitive Offenders' Act which has application to criminals only, shows that it was never understood in England that insane persons were amenable to the latter act. The fact that no precedent exists in this country or in England is strong proof that our interstate extradition laws were never intended to apply to a case of an escaped lunatic.

APPELLANT'S BRIEF.

Since completing the foregoing portions of our brief, we have received a copy of the Appellant's brief. Under "Point IV" (brief, p. 35), counsel for appellant takes up a discussion of the question whether the indictment, by alleging Thaw's commitment, detention and escape, from the Matteawan State Hospital, contains matter destructive of its validity.

The attention of the court is directed to the cases of *People vs. Taylor*, 138 N. Y., 398, decided in 1893, and *People vs. Silverman*, 181 N. Y., 240, decided in 1905. Basing their argument on the New York Penal Laws, sections 34, 815 and 1220, and on the above mentioned cases, they say on page 43 of their brief that

there is no presumption "that insanity generally, while presumed to continue, is presumed to be of the type which relieves from criminal responsibility."

We most emphatically assert that such is the presumption even in the State of New York, or else we do not read aright the case of *People vs. Egnor*, 175 N. Y., 419, 426, decided in 1903, ten years after the Taylor case relied on by appellant was decided. In the *Egnor* case it was held:

> "Where the defendant has given evidence tending to show that at the time he committed the homicide he was insane, the prosecution must prove his sanity at that time, not only by a preponderance of evidence, but his sanity must be proved beyond a reasonable doubt."

It will be seen that contrary to appellant's contention, when evidence of insanity once appears in the case, the burden shifts onto the prosecution to show beyond a reasonable doubt that the defendant is (1) either not insane at all; or (2) that the form of his insanity does not prevent his knowing the nature and quality of his act and that it was wrong.

In no other way can we interpret the *Egnor* decision. This court will not place a different interpretation on a New York statute from that placed on it by New York courts.

If there is anything different in the *Taylor* case, it must be considered as overruled by the *Egnor* case. But there is not. The main question in that case was whether there was sufficient evidence to support the

verdict of guilty returned by the jury. Maynard, J., after discussing the evidence, says (p. 405):

> "In this state of the evidence the issue of sanity was a proper subject for final determination by the jury, and we do not think that this court even if it possessed the power, should disturb their verdict."

Again referring to the instructions to the jury, he says (p. 406):

> "The jury were told that upon the issue of the defendant's sanity, as upon every other controverted question in the case, the defendant is entitled to the benefit of every doubt which is reasonable, which can be reasonably entertained by a reasonable man; and this proposition was reiterated and emphasized, so that it must have been prominently and pervasively in the minds of the jury when they retired for their final deliberations."

The quotation from the case printed in appellant's brief (p. 37) should be read in connection with the point there under consideration and what is elsewhere said in the opinion.

We presume stress is laid on the last sentence that appellant has quoted (p. 37). It may be that it is from this that the erroneous statement in their brief, paragraph two, page 43, is taken. The sentence reads:

> "If, when a specific act is contemplated, he has the power to know whether it is wrong to do it, and right to refrain from doing it, *the law presumes* that he has the *power to choose* between the right and the wrong course of action," etc.

The presumption is based on the hypothesis preceding it. It is a presumption of *"power to choose"* conceding the defendant has sufficient mental ability *"to know."* This is the only particular in which the law of New York differs from the law of most other states. It is the point that Judge Maynard says, (immediately following the quotation), has been criticised by eminent alienists.

But this is a very different proposition from saying that when insanity is shown to exist at the time of the commission of the crime, the presumption still continues that the defendant *knows* the nature and quality of his act and *knows* it is wrong.

Under the last mentioned circumstances the contrary presumption prevails, else as held in the *Egnor case,* the burden would not shift onto the prosecution to show the defendant sane beyond a reasonable doubt.

What we have said of the *Taylor case* applies to the *Silverman case.* Neither of them sustain the appellant's contention.

In the *Taylor case,* on which they rely, besides what is said on page 89 of typewritten brief, we would suggest the following for oral argument:

> The facts in that case show that Taylor, the accused, at the time of the commission of the crime was an inmate of the Auburn States Prison; the prison physician reported that in his opinion Taylor was insane. He was transferred to an asylum for detention and observation. The asylum authorities discharged him, reporting that in their opinion he was sane. Upon the trial for homicide there was conflicting evidence from alienists on

the question of his sanity and responsibility. One set of alienists holding to the opinion that he was criminally responsible; the other alienists holding that he was irresponsible. Upon this proof the trial court submitted the question to the jury, under proper instructions, which are referred to in our brief. The jury returned a verdict of guilty, thus finding that Taylor was criminally responsible. The main question raised in the Appellate Court was, whether or not upon the whole record the court could say as a matter of law, that the verdict was wrong. The case is fairly to be distinguished from the case at bar because the extradition record contains evidence of insanity. There is no evidence of sanity contained in the record to rebut this; therefore, it cannot be said that there was anything to submit to the District Court raising the presumption of criminal responsibility, as was said in the Taylor case. This is a distinguishing feature between the two cases and it applies, not only to the Taylor case, but it distinguishes the case at bar from the Silverman case and the Keen case cited in the Appellant's brief.

NOTE 1. This was an inmate of Auburn Prison, not of Auburn Criminal Insane Asylum.

NOTE 2. The asylum authorities pronounced the man sane before this decision.

Coming to a concrete application of the law of the *Egnor case* to the case at bar, we say the indictment itself and other evidence in the record overcomes the presumption of sanity and establishes insanity. It shifts the burden onto the prosecution to show Thaw is a "person" within the meaning of the extradition laws.

Upon this question jurisdiction depends. So far as it is a question of fact, it has been determined by the District Court in favor of the petitioner.

Conclusion.

It seems to us that Point VI in our argument is unanswered and unanswerable. We do not recede from the other positions taken, but it seems to us that this perhaps is the strongest and most potent reason why the prisoner should be discharged.

We have refrained from quoting or trespassing upon the argument of Aldrich, Judge, in the court below. His reasoning is sound and requires no comment from us. The opinion is printed at length in the record and is before the court. It would be only using time and space to reprint what appears therein. We have preferred to present the matter to this court in practically the same form as it was presented to the court below.

It is respectfully submitted that the order of the District Court should be sustained and this appeal dismissed with costs.

WILLIAM A. STONE,
MERRILL SHURTLEFF, and
GEORGE F. MORRIS of
DREW, SHURTLEFF, MORRIS & OAKES.

Office Supreme Court, U. S.
FILED
JUN 13 1914
JAMES D. MAHER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. ~~1107~~ 514

IN RE SUPPLEMENTAL PETITION OF HENRY KENDALL THAW FOR WRIT OF *HABEAS CORPUS*.

APPLICATION FOR BAIL BY HENRY KENDALL THAW.

WILLIAM A. STONE.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 1105.

IN RE PETITION OF HENRY KENDALL THAW FOR WRIT OF *HABEAS CORPUS*.

PETITION.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Henry Kendall Thaw, through his attorney and agent in this behalf, most respectfully asks leave to file this supplemental petition containing some facts that have occurred since the filing of his original petition for bail.

Since filing his original petition for bail another demand has been made by him and his counsel upon Holman A. Drew, your petitioner's custodian, to take him to the city of Pittsburgh, State of Pennsylvania, there to confer with his attorney and to act as a witness in the cases referred to in the original petition.

That the said Holman A. Drew positively refused to take your petitioner to the said city of Pittsburgh unless ordered to do so by this court or other proper authorities.

That Thomas Carmody, Attorney General of the State of New York, has been applied to to give his consent that the said Thaw might be taken to the said city of Pittsburgh, as a witness in the said cases referred to in the original petition, under the custody of the said Drew, and he has refused to give his consent.

That the position of Thomas Carmody, the Attorney General of the State of New York, that bail should not be allowed after appeal in extradition cases, should not prevail in this case, for the reason that is clearly expressed and decided by Judge Aldrich in the court below. This is not an extradition case, and the laws of extradition do not apply to persons charged with conspiracy to escape from a lunatic asylum. If such rule of law should be applied in this case Thaw will have been, by the time this case can be argued in this court, more than one year in restraint and in the custody of officials appointed by the court below, which is a longer time for which he could be sentenced in New York if he were tried and convicted of the charge in the indictment, namely, conspiracy to pervert justice.

The allegations filed by the State of New York in the answer filed in this case do nothing more than challenge the conclusions of Judge Aldrich, of the court below, on admitted facts, and is against the report of the commission appointed to ascertain whether Thaw is safe to be at large, and they should receive no consideration.

If Thaw was taking this appeal it might be said he had invited the application of the rule sometimes followed that bail should not be taken on extradition cases, but he is the appellee in this case, and is not personally responsible for its being here.

We believe that your honors should make an order permitting Thaw to give bail under section 3, rule 34, of this court; but if your honors hold that Thaw is not entitled to bail, we most earnestly request your honors to make an order directing Holman A. Drew, his custodian, to take him to the city of Pittsburgh under his custody as often and for as long

a period as his presence there may be necessary to confer with counsel and to testify in the matter of the suits set up in the original petition for bail, and for such other orders for his protection and safety while going to and coming from Pittsburgh as your honors may see fit and proper.

MERRILL SHURTLEFF.

DISTRICT OF COLUMBIA, *ss:*

Personally appeared before me, a notary public duly authorized to administer oaths, Merrill Shurtleff, who being by me duly sworn, doth depose and say that he is thoroughly familiar with the facts set forth in the above supplemental petition; that he is the agent of Henry Kendall Thaw, and authorized to act for him in this matter, and that the facts set forth in the above supplemental petition are true.

MERRILL SHURTLEFF.

Sworn to and subscribed before me this 12th day of June, 1914.

CARLTON L. HOUSTON,
Notary Public in and for the District of Columbia.

My commission expires September 21, 1918.

Office Supreme Court, U
FILED
JUN 8 1914
JAMES D. MAHER
CLE

IN THE

Supreme Court of the United States

514

No. [illegible] OCTOBER TERM, 1913.

IN RE

PETITION OF HENRY KENDALL THAW,

FOR WRIT OF HABEAS CORPUS.

APPLICATION FOR BAIL BY HENRY KENDALL THAW.

WILLIAM A. STONE

Smith Bros. Co. Inc., Franklin Print, 407-9 Grant Street, Pittsburgh, Pa.

IN THE

Supreme Court of the United States

No. 1105 OCTOBER TERM, 1913.

IN RE

PETITION OF HENRY KENDALL THAW,

FOR WRIT OF HABEAS CORPUS.

PETITION.

To the Honorable, the Chief Justice
And the Associate Justices of the
Supreme Court of the United States:

The Petition of Henry Kendall Thaw most respectfully represents:

That there is pending in the Orphans' Court of Allegheny County, in the State of Pennsylvania, the accounts of the Trustees of your Petitioner, his brothers, Edward and Josiah Thaw, and his sisters, Margaret Thaw Carnegie and Alice Thaw Whitney, to which accounts there have been exceptions filed by the Petitioner, his two brothers and his two sisters.

That in said accounts, said Trustees charge themselves with subsidiary stocks of the Standard Oil Com

pany of New Jersey as principal when they should be accounted for and paid over to your Petitioner and his two brothers and two sisters as income, under the will of their father, William Thaw.

That a copy of said will and certified copies of the records of said accounts, and exceptions are presented herewith.

That under the laws of Pennsylvania your Petitioner is advised, said subsidiary stocks should be rated as income instead of principal, as they were dividends declared by the Standard Oil Company of New Jersey upon stocks of the Standard Oil Company of New Jersey, held by the Trustees of your Petitioner and of his brothers and sisters, which stocks in full are still held by said Trustees for your Petitioner and his brothers and sisters, and are of greater value than they were at the time of the death of the father of your Petitioner.

That it becomes necessary at the hearing of these exceptions to these accounts to prove the value of the stocks of the Standard Oil Company at the time of the death of the father of your Petitioner, in 1889, and certain other facts showing that these subsidiary stocks are income and not principal.

That your Petitioner was at the time of the death of his father about eighteen years of age and has knowledge of the value of the Standard Oil Company at that time, and has subsequent knowledge of the facts that it will be necessary to prove at these hearings.

That he is the oldest of these five children of William Thaw, deceased, and has a more complete knowl-

edge of the facts than any of them, some of them being very young at the time of their father's dath.

That said accounts have been set down for audit in the Orphans' Court for hearing and will be presently heard in said court.

That the presence of your Petitioner is necessary, not only as a witness upon said audits in the City of Pittsburgh, Allegheny County, and State of Pennsylvania, in his own interest and in the interest of his brothers and sisters but is also necessary to assist his counsel and the counsel of his brothers and sisters in the preparation for the trial of said cases.

That he should go there at once untrammeled by any custodian, that he might have the free and confidential communication of his attorneys and of the attorneys of his brothers and sisters in the preparation and trial of said audits.

That the amounts involved are large.

That your Petitioner is now in the custody of one, Holman A. Drew, by order of the Judge of the District Court of the United States for New Hampshire. That such order was made in a decree by said court in a writ of *habeas corpus* discharging your Petitioner from the custody of the Agent of New York, who held a warrant in extradition by the Governor of New Hampshire on the requisition of the Governor of New York. See final decree of District Court of New Hampshire of record in this case.

That Your Petitioner is retained in the State of New Hampshire by said custodian, who although requested has not, as yet, consented, to take your Petitioner to Pittsburgh, Pennsylvania.

That said requisition charged your Petitioner with the simple misdemeanor of conspiracy to escape from Matteawan Asylum, in Dutchess County in the State of New York.

That an appeal was taken by the State of New York in the name of Holman A. Drew to the Supreme Court of the United States, and is in this court now pending.

That your Petitioner's enlargement on bail is not only necessary in the preparation and trial of these said audits, in the City of Pittsburgh, aforesaid, but is necessary to enable him to freely confer with his attorneys in the preparation and trial of the case now pending in this court, in which the liberty of your Petitioner is at stake.

Said trial and hearings will not likely take place in this court until some time in the Fall of 1914.

That in the proceedings in the United States District Court of New Hampshire, said court did appoint a Commission of very capable and eminent persons to determine whether it was safe for your Petitioner to be at large. Which Commission did report that it was safe for your Petitioner to be at large.

That said District Court of New Hampshire conceded your Petitioner's right to bail, but expressed the

idea that said application for bail should be made to this Court, or to some Judge thereof after said appeal had been taken.

Your Petitioner referring to other Petitions and Statements filed herewith, by attorneys, therefore respectfully prays Your Honors to make an order permitting him to enter bail with such sureties, conditioned for his appearance at such time and such place as Your Honors shall fix in said order, and for the further observance and performance of any other and all conditions and provisions which Your Honors may direct to be stipulated in the bond given by him on his enlargement.

And Your Petitioners will ever pray.

H. K. THAW.

May 5th, 1914.

State of New Hampshire,
County of Merrimack, } ss:

Before me, a Notary Public in and for said County and State, personally appeared Henry Kendall Thaw, who being duly sworn according to law, doth depose and say that the facts set forth in the foregoing Petition are true and correct.

H. K. THAW.

Sworn to and subscribed before me this 5th day of May, 1914.

.....

Notary Public.

Office Supreme Court, U. S.
FILED
JUN 12 1914
JAMES D. MAHER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

514

NO. [redacted], OCTOBER TERM, 1913.

In Re

Petition of HENRY KENDALL THAW, for Writ of Habeas Corpus.

PAPERS IN OPPOSITION TO APPLICATION FOR BAIL.

THOMAS CARMODY,
Attorney General of the State of New York.

IN THE

Supreme Court of the United States.

NUMBER 1105—OCTOBER TERM, 1913.

In re Petition

of

HENRY KENDALL THAW for Writ of Habeas Corpus.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Now comes Thomas Carmody, Attorney General of the State of New York, and in opposition to the petition of Henry Kendall Thaw to be admitted to bail in the above entitled proceeding, states that he is the Attorney General of the State of New York and has been such since January 1, 1911. That in opposition to the granting of said petition he respectfully submits to this Honorable Court and to the Justices thereof the affidavit of William Travers Jerome hereunto annexed, who in the above entitled proceedings has been acting by designation and appointment as a Special Deputy Attorney General of the State of New York in charge of said particular matter. Further, he respectfully presents to this Court that the reasons

alleged in the petition herein for the release of the said Thaw on bail are entirely inadequate. That he is informed and believes that while it is true that the petitioner is retained in the State of New Hampshire in custody that said custody is not close custody; that the said petitioner is residing at a hotel in company with one Holman A. Drew, appointed by the District Court of the United States for the District of New Hampshire as a keeper, on behalf of said Court, of said Thaw, pending a decision upon appeal in the above entitled matter; that said Thaw has large liberty to go and come almost at will in the town and its vicinity and that he is at liberty to receive any friends or acquaintances that he may desire and at all times freely to consult with counsel or any persons with whom he chooses to confer. That should there be proceedings of any nature in the State of Pennsylanvia in the Courts of said State the testimony of said Thaw may be readily and speedily procured by deposition. That in the above entitled proceedings the real party in interest is the State of New York which seeks the interstate rendition of said Thaw as a fugitive from its justice, although Holman A. Drew is the nominal party of record. The State of New York is ready and willing at all times to proceed to an argument upon the merits in the appeal now pending in the above entitled matter and I am of the opinion that this Court would at once upon a mere inspection of the record, without hearing argument of counsel, reverse the order made below, discharge the writ of habeas corpus and remand the prisoner to the custody of the Sheriff of Coos County that he might be given up under the warrant of the Governor of the State of New Hamp-

shire to the authorities of the State of New York and taken to said State for trial upon the indictment found against him. It is the intention of the State of New York at the earliest time permitted by the rules of this Honorable Court to move this Court to advance the above entitled proceeding over other causes and proceedings upon its docket that the appeal therein may be speedily determined because of the large public interests involved, and should it be consistent with the practise and condition of business in the Supreme Court of the United States, it is now respectfully asked that said cause be advanced out of its order on the docket of this Court and a time set for the argument of the appeal herein.

It is respectfully requested on behalf of the State of New York that the prayer of the petitioner be denied.

THOMAS CARMODY,
Attorney General of the
State of New York.

State of New York,
County of Albany, } ss.:

Thomas Carmody, being duly sworn, says, I have read the foregoing affidavit and know the contents thereof and the same is true to my own knowledge except as to those matters stated to be set forth upon information and belief, and as to those matters I believe it to be true.

THOMAS CARMODY.

Sworn to before me this 10th
day of June, 1914.

W. M. Thomas
Notary Public
Albany Co, N.Y.

(Seal)

SUPREME COURT OF THE UNITED STATES.

In re Petition

of

HENRY KENDALL THAW, for Writ of Habeas Corpus.

State of New York,
City and County of New York, } ss.:

William Travers Jerome, being duly sworn, deposes and says:

I am an attorney and counsellor at law, residing in the City of New York, and I was District Attorney of the County of New York during the years 1902 to 1909 both inclusive.

On the twenty-eighth day of June, 1906, the above named Henry Kendall Thaw was indicted by the Grand Jury of the County of New York for the crime of murder in its first degree, and thereafter on the twenty-third day of January, 1907, before a Justice of the Supreme Court of the State of New York, and a jury, the said Thaw was brought to trial upon such indictment. The defense interposed by the said Thaw was that he was insane at the time of the commission of the alleged offense. The result of said trial was a disagreement of the jury, and thereupon the said Thaw was remanded to await a new trial. Thereafter, and in January, 1908, the said Thaw was again put upon trial upon said indictment before a Justice of the Supreme Court and a jury. The defense interposed in behalf of said Thaw was

that he was insane at the time of the commission of the offense alleged, and the result of said trial was that the jury acquitted the said Thaw upon the ground of insanity specifying the same in their verdict as required by the law of the State of New York when an acquittal is had upon the ground of insanity. Thereafter, on the first day of February, 1908, in accordance with the provisions of the statutes of the State of New York, the Justice of the Supreme Court presiding at the last trial, committed the said Thaw to the Matteawan State Hospital for the Criminal Insane, there to be kept in said hospital until discharged by due course of law. Pursuant to said commitment, the said Thaw was confined in said institution for the criminal insane. Thereafter, on or about the first of May, 1908, the said Thaw sued out a writ of habeas corpus in the Supreme Court of the State of New York claiming that he was unlawfully detained in the said asylum for the criminal insane at Matteawan, and upon the return to said habeas corpus, a hearing was had before the Honorable Joseph Morschauser, a Justice of the Supreme Court. Upon said hearing, testimony was given on both sides and the said Justice held that Thaw was still insane and dismissed the writ and remanded Thaw to the institution from whence he came, namely, that of the State Asylum for the Criminal Insane at Matteawan. Said Thaw was thereupon again confined in the asylum at Matteawan and thereafter sued out another writ of habeas corpus in the Supreme Court of the State of New York, whereby he raised the question of law that he was detained in violation of the Constitution of the United States in that the provisions of the Constitution of the United States

providing that no person should be deprived of his liberty without due process of law were violated. Said writ of habeas corpus was brought on to a hearing before the Supreme Court in the State of New York upon questions of law alone and the Supreme Court of the State of New York decided that the commitment of Thaw to the said asylum was legal and that neither the Constitution of the United States nor of the State of New York had been violated, and from such decision the said Thaw appealed to the Court of Appeals of the State of New York, which affirmed the order below dismissing the writ and remanding the prisoner, holding that the commitment was legal and the statute under which the commitment was made was constitutional. This case is found reported under the title of People *ex rel.* Peabody *v.* Chandler, 133 App. Div. (N. Y.), 159, and in the Court of Appeals under the same title in Volume 196 N. Y. Rep., 529. Thereafter, and on or about August 20, 1909, as deponent is informed and believes, an application for the allowance of a writ of error to the Supreme Court of the United States from the decision of the Court of Appeals above referred to was made to Mr. Justice McKenna, one of the Justices of the Supreme Court of the United States, and said application was by him denied. Thereafter, the said Thaw remained in the said asylum until in or about June, 1909, when another writ of habeas corpus was sued out in the Supreme Court of the State of New York on his behalf and upon the return thereto he claimed that he was entitled to be discharged from detention in said state asylum upon the ground that he was presently sane. A prolonged hearing was had before Mr.

Justice Mills, occupying seventeen Court days and upon this hearing seventy-seven witnesses were examined orally, and the testimony of forty-nine witnesses given at one or more of the prior trials or investigations was read in evidence. Thereafter, in August, 1909, Mr. Justice Mills, a Justice of the State of New York, before whom such hearing was had made an order dismissing the writ and remanding the prisoner, and wrote an elaborate opinion upon the question of the then insanity of said Thaw, holding that he was insane and afflicted with an incurable form of insanity, which said opinion will be found reported at length in 118 N. Y. Supp., 388, and also in 152 N. Y. St. Rep., 388.

Thereafter the said Thaw was returned to the said State Asylum and continued in said custody until on or about the 17th day of June, 1912, when another writ of habeas corpus was sued out on his behalf in the Supreme Court of the State of New York, and upon return being made thereto a prolonged hearing for weeks before Mr. Justice Keogh was had at which the sole question litigated was the then mental condition of the said Thaw.

Mr. Justice Keogh after hearing many witnesses for both sides decided that Thaw was presently insane and dismissed the writ of habeas corpus and remanded said Thaw to the custody of the said State Asylum for the Insane.

Thereafter said Thaw remained in the custody of the State Asylum at Matteawan until the 17th day of August, 1913, at which time he escaped from said custody through a criminal conspiracy and fled to the Dominion of Canada, from which he was deported as an undesirable alien by the Immigration Commission of the Dominion of Canada and re-

turned to the State of New Hampshire where he was taken into custody as a fugitive from the justice of the State of New York upon the 10th day of September, 1913.

Thereafter and upon the 13th day of September, 1913, said Thaw sued out a writ of habeas corpus in the United States District Court of the District of New Hampshire, and in obedience thereto upon the 16th day of September, 1913, the said Henry Kendall Thaw was produced before the District Court of the United States at Littleton in the State of New Hampshire.

Thereupon return was made to said writ of habeas corpus and the return being traversed, the hearing thereon upon the merits was by mutual consent adjourned.

Thereafter and upon the 23rd day of October, 1913, the Grand Jury of the County of New York in the State of New York, indicted the said Thaw and others for the crime of conspiracy to pervert and obstruct the administration of the law of the State of New York under Section 580, Subdivision 6, of the Penal Law of the State of New York, said indictment in substance charging a conspiracy to effect the escape of said Thaw from Matteawan alleged to have been entered into prior to the said 17th day of August, 1913, upon which day it was therein alleged said Thaw escaped from Matteawan as a consequence of said conspiracy.

Thereafter a requisition was made by the Governor of the State of New York upon the Governor of the State of New Hampshire for the rendition of said Thaw as a fugitive from the justice of the State of New York, and hearing being had upon the merits before the Governor of the State of New Hampshire, the Governor issued his warrant to the

Sheriff of Coos County, New Hampshire, directing him, among other things, to turn over the body of the said Henry Kendall Thaw to the officers of the State of New York to the end that the said Thaw might be taken to the State of New York to stand trial for the crime whereof he then stood indicted in the State of New York. Said Thaw, however, being in the custody of the United States District Court of the District of New Hampshire, it was impossible for the said Sheriff to execute the warrant of the Governor of the State of New Hampshire, but by leave of Court and upon consent of counsel, said Thaw was temporarily discharged from the custody of the District Court of the United States for the District of New Hampshire, and was arrested at once by the Sheriff of Coos County under the said warrant of the Governor of the State of New Hampshire.

Thereupon the said Thaw immediately filed a petition for a writ of habeas corpus reciting all the facts and claiming that he was detained in violation of his rights under the Constitution of the United States, and forthwith there issued from the District Court of the United States for the District of New Hampshire upon the 18th day of November, 1913, a new writ of habeas corpus directing the Sheriff of Coos County who had the custody of the body of said Thaw by virtue of the warrant of the Governor of the State of New Hampshire, to produce the body of the said Thaw forthwith before the said United States District Court for the District of New Hampshire. Said writ of habeas corpus was forthwith served, the body of said Thaw in obedience to said writ was produced before said Court, and said Court pending a decision upon the said writ of habeas corpus and re-

turn thereto took the custody of the body of said Thaw from the Sheriff of Coos County and committed it to the United States Marshal for the District of New Hampshire jointly with said Sheriff of Coos County as keepers for the Federal Court.

Thereafter hearings were had before the District Court of the United States for the District of New Hampshire upon the merits involved in the issues raised by the writ of habeas corpus, the return, and the traverse thereto, all of which proceedings are found in the records of the Supreme Court of the United States in a certain matter entitled "*In re* Petition of Henry Kendall Thaw for Writ of Habeas Corpus," the docket number of which is 1105, October Term, 1913.

After the hearings last above referred to the District Court of the United States for the District of New Hampshire decided that the writ of habeas corpus, last above referred to, which had been sued out by the said Thaw, should be sustained and that the prisoner should be discharged from the custody of the Sheriff of Coos County, which custody the said Sheriff sought to maintain by virtue of the warrant of the Governor of the State of New Hampshire above referred to. From this decision of the District Court of the United States for the District of New Hampshire, an appeal was taken and allowed and the record was transmitted to the Supreme Court of the United States and is now docketed in the Supreme Court of the United States as No. 1105, October Term, 1913.

In all the above proceedings this deponent was actively interested and had personal knowledge of them either as District Attorney of the County of New York in the State of New York, or as a

Special Deputy Attorney General of the State of New York, deputized and designated by virtue of the Laws of the State of New York to take charge of and conduct said proceedings on behalf of the State of New York.

While the proceedings above described were being had in the District Court of the United States for the District of New Hampshire, an application on behalf of said Thaw was made that said Thaw be admitted to bail. This application was opposed on behalf of the State of New York, among other things upon the ground that said Thaw, while capable under the Laws of the State of New York of committing crime, was still a person of unsound mind and suffering from such form of mental disease that his release would be a grave danger not only to the community at large, but to himself as well.

Thereupon the Honorable Edgar Aldrich, United States District Judge for the District of New Hampshire, appointed a commission to examine into the question as to whether or not Thaw's mental condition was presently such that his release would be a source of danger to the community, and said commission was appointed by the said Judge for the purpose of advising the Court as to Thaw's then mental condition in respect to his being released on bail being safe or unsafe, and in the order appointing said commission the Judge so limited the scope of the inquiry as to make it an *ex parte* one, with the result that the People of the State of New York were precluded from submitting to said Commission the vast mass of evidence, which they had at their disposal and were then ready and willing to submit, bearing upon the question of said Thaw's insanity and upon the

question of his release from custody being dangerous not only to the community at large, but to himself.

Said Commission reported to the Honorable Edgar Aldrich that in their opinion it is reasonably probable that Harry Kendall Thaw's liberty under bail would not be dangerous or a menace to the public peace and safety.

The order above referred to sustaining the writ of habeas corpus and discharging the said Thaw from the custody of the Sheriff of Coos County under the warrant of the Governor of the State of New Hampshire was made without the said District Court of the United States for the District of New Hampshire or the Honorable Edgar Aldrich making any decision upon the question of bail, and in the opinion filed by the said Honorable Edgar Aldrich in reference to the sustaining of the said writ and the said discharge of Thaw, he stated as follows:

> "I have no doubt of the right of the Court to grant bail under the circumstances of this case, but as the question is an interlocutory one, of which the petitioner has the right to avail himself at any time and at any stage of the proceedings, and as the case is about to go out of the control of this Court and into the Supreme Court, and as Supreme Court Rule 34 has an important and perhaps a controlling bearing upon the question, I am disposed to leave the motion for bail undetermined without prejudice."

And further on in said opinion, he said:

> "If the broad provisions of Rule 34 are to be interpreted as covering questions of bail in habeas corpus where the person is taken

from extradition custody they are entirely conclusive of the questions here in favor of bail, because in general terms they cover all habeas corpus cases. That that rule is something more appropriate for interpretation by the Supreme Court than by this Court, is the reason for leaving the question of bail undecided."

Further, by the order of the said District Court of the United States for the District of New Hampshire sustaining the writ of habeas corpus and discharging Thaw from the custody of the Sheriff of Coos County under the warrant of the Governor of the State of New Hampshire the said Thaw was not discharged absolutely from custody, but an appeal to the United States Supreme Court having been taken and allowed by it pending the decision of the Supreme Court of the United States, or the admission by the Supreme Court of the United States, or a Justice thereof of said Thaw to bail pending the said appeal, said District Court of the United States for the District Court of New Hampshire committed Thaw to the custody of Holman A. Drew as a keeper for the District Court of the United States for the District of New Hampshire and said Thaw is now, as deponent is informed and believes, held in custody by said Holman A. Drew pursuant to such order.

The State of New York seeking extradition of said Thaw from the State of New Hampshire for crime, contends that Rule 34 of the Rules of the Supreme Court of the United States does not and never was intended to apply to habeas corpus proceedings in extradition or interstate rendition cases, and this point was elaborately argued before Mr. Justice Aldrich.

The State of New York claims further that even if Rule 34 does apply to questions of bail in general in cases of interstate rendition, the particular case at bar will not be construed to be within the scope or purpose of this Rule because of the fact that Thaw is presently insane and that his release would be dangerous both to himself and the community.

It is submitted that it is plain that if a Federal Court has taken into its custody upon a writ of habeas corpus issued in interstate rendition proceedings, a dangerous lunatic, even should such Court decide that extradition could not in the particular case be had, it would yet not discharge absolutely or on bail such a person to be a menace to himself and the community, but such a person having come into the lawful custody of the Court, the Court would be constrained to make such order or take such proceedings as would secure the community and the lunatic from injury.

Mr. Justice Aldrich did not see fit to discharge Thaw from custody, and he still remains in the custody of the District Court of the United States for the District of New Hampshire. This Court is asked to discharge absolutely upon bail said Thaw whom deponent is informed and believes to be presently insane with such a form of insanity as would be dangerous to himself and the community at large, should he be released from custody. Such belief of deponent is founded upon an intimate personal knowledge of said Thaw and all the proceedings above referred to extending over a period of eight years, and also upon information and advice obtained at great expense to the County and State of New York from a number of the most

experienced and well known alienist in the United States.

It is respectfully submitted that this Court will not remove the great responsibility of discharging absolutely upon bail said Thaw, while the present mental condition of said Thaw is what it is.

Respectful attention is called to the fact that the proceedings before the Commission appointed by Mr. Justice Aldrich above referred to were entirely *ex parte* upon this question of the present mental condition of Thaw and the impropriety and unlawfulness of his admission to bail. An elaborate brief upon the facts was presented to Mr. Justice Aldrich, the statements of fact in which said brief are true to deponent's own knowledge, and this Court is respectfully referred to the same for a full statement of facts showing, it is respectfully submitted, conclusively that Thaw should not at this time by this or any other Court be liberated upon bail. Said brief is intended to be taken as a part of this affidavit and is hereto annexed and marked "Exhibit A."

All of which is most respectfully submitted.

WM. TRAVERS JEROME.

Sworn to before me this 10th day of June, 1914.

George F. Lewis,
Notary Public,
Kings Co., No. 66.

Certif. filed in N. Y. Co., No. 86.

EXHIBIT A.

DISTRICT COURT OF THE UNITED STATES,

DISTRICT OF NEW HAMPSHIRE.

In the Matter

of

HENRY KENDALL THAW.

MEMORANDUM IN OPPOSITION TO MOTION FOR BAIL.

FIRST.

Some Facts.

I.

Upon the first trial of Thaw for homicide the defense was insanity, and, on behalf of Thaw a large amount of testimony was introduced which his counsel claimed showed that Thaw was insane when he killed White.

Reference is now made to testimony as to facts and not to opinion testimony whether from experts or laymen.

This testimony the Commission did not have before them, although they were informed that it was available.

Here is a list of the experts who were called upon the first trial for homicide, together with a statement of their qualifications and their opinion upon the *facts put in evidence by counsel for Thaw.*

EXPERTS CALLED BY THAW.

DR. CHARLES G. WAGNER.

Qualifications.

Fifty years old; graduate of Cornell University and of the College of Physicians and Surgeons Columbia University, New York; twenty-seven years in practice; seven years as assistant physician and assistant superintendent in the insane asylum at Utica, New York; Medical Superintendent of State Asylum for the insane at Binghamton, New York, for fifteen years, which had an average for the fifteen years of 1,400 insane patients.

OPINION.

That Thaw was insane when he shot White, *basing his opinion upon the facts proven at the trial by Thaw's counsel* and several prolonged examinations made by himself personally of Thaw. The form of the insanity not definitely given.

DR. BRITTON D. EVANS.

Qualifications.

Forty-nine years of age; graduate of the College of Physicians and Surgeons of the City of Baltimore; four years assistant superintendent at the Maryland Hospital for the Insane at Catonsville, Maryland; for fifteen years superintendent of the State Hospital for the Insane at Morris Plains, New Jersey, where there was a yearly average of about 1,800 patients.

OPINION.

That Thaw was insane when he shot White, *basing his opinion upon the facts proven at the trial*

by Thaw's counsel and several prolonged examinations made by himself personally of Thaw. The form of the insanity not definitely given.

DR. GRAEME M. HAMMOND.

Qualifications.

Forty-nine years of age, graduate of the New York University Medical Department; specialist in nervous and mental diseases for twenty years; professor in nervous and mental diseases in the New York Post Graduate Medical School and Hospital; formerly professor in mental and nervous diseases in the University of Vermont; visiting neurologist to the City Hospital on Blackwell's Island; ex-President of the Neurological Association.

OPINION.

That Thaw was insane when he shot White, *basing his opinion upon the facts proven at the trial by Thaw's counsel.* The form of the insanity not definitely given.

DR. WILLIAM A. WHITE.

Qualifications.

Thirty-seven years of age; author of a number of publications upon mental diseases; specialist in nervous and mental diseases; superintendent of the Government Hospital for the Insane at Washington, D. C.

OPINION.

That Thaw was insane when he shot White, *basing his opinion upon the facts proven at the trial by Thaw's counsel.* The form of insanity not definitely given.

DR. SMITH ELY JELLIFFE.

Qualifications.

Forty years of age; a doctor of philosophy; graduate of Columbia University and graduate of the Medical Department of Columbia University; specialist in nervous and mental diseases for thirteen years; had experience in the Binghamton State Hospital for the Insane; Bloomingdale Hospital for the Insane; Craig Colony for Epileptics; and made a special study of insanity in European Hospitals.

OPINION.

That Thaw was insane when he shot White, *basing his opinion upon the facts proven at the trial by Thaw's counsel.* The form of insanity not definitely given.

DR. CHARLES W. PILGRIM.

Qualifications.

Fifty-one years of age; President of the New York State Commission in Lunacy; graduate of Bellevue Medical College in New York; specialist in nervous and mental diseases; assistant physician of the Utica State Asylum for the Insane for three years; studied in Europe from 1885 to 1886; returned to the Utica Asylum for three years; appointed medical superintendent of the Willard State Hospital for the Insane in 1889, where he remained until 1893, and then became medical superintendent of the Hudson River State Hospital for the Insane at Poughkeepsie, which position he had held for fourteen years.

OPINION.

That Thaw was insane when he shot White, *bas-*

ing his opinion upon the facts proven at the trial by Thaw's counsel. The form of insanity not definitely given.

DR. MENAS S. GREGORY.

Qualifications.

Thirty-four years of age; specialist in nervous and mental diseases; graduate of the Albany Medical Department of Union University; interne at the Craig Colony for Epileptics; assistant physician at Kings Park State Hospital for the Insane from 1899 to 1902; resident alienist of Bellevue Hospital, New York, in charge of the psycopathic ward from 1902 to 1907; examined more than 2700 alleged insane patients annually, 20 per cent. of whom had criminal tendency.

OPINION.

That Thaw was insane when he shot White, *basing his opinion upon the facts proven at the trial by Thaw's counsel.* The form of insanity not definitely given.

DR. ALLEN McLANE HAMILTON.

Specialist in mental and nervous diseases for thirty-seven years.

OPINION.

That Thaw was insane when he shot White, *basing his opinion upon the facts proven at the trial by Thaw's counsel*, and upon several personal examinations made by him of Thaw, and upon information received from Thaw's relatives and friends. He was of the opinion that Thaw was a paranoiac and incurably insane.

EXPERTS CALLED BY THE PEOPLE.

DR. AUSTIN FLINT.

Qualifications.

Graduate of the Jefferson Medical College in Philadelphia in 1857; a specialist in mental diseases for twenty-five years, a man eminent and well known in his profession.

OPINION.

That Thaw was insane when he shot White, *basing his opinion upon the facts proven at the trial by Thaw's counsel and observation of Thaw for many days during the progress of the trial.* The form of the insanity was paranoia and incurable.

DR. WILLIAM HIRSCH.

Qualifications.

Graduate of the College of Physicians and Surgeons; a specialist in nervous and mental diseases; studied in the University of Berlin, became assistant to Professor Mendel of the Berlin University for two years, one of the most noted alienists in Europe, then became assistant to Dr. Kahlbaum, a very eminent German alienist at the Institution for the Insane in Gerlitz, then studied in Paris under Charcot and for some time with Wernicke in Breslau.

OPINION.

That Thaw was insane when he shot White, *basing his opinion upon the facts proven at the trial by Thaw's counsel.* The form of the insanity was paranoia and incurable.

DR. WILLIAM B. PRITCHARD.

Qualifications.

Specialist in mental and nervous diseases for nineteen years; Professor of nervous and mental diseases in the New York Polyclinic School for Post Graduate Medical Instruction.

OPINION.

That Thaw was insane when he shot White, *basing his opinion upon the facts proven at the trial by Thaw's counsel.* The form of the insanitay was paranoia and incurable.

DR. ALBERT W. FERRIS.

Qualifications.

Graduate of the College of Physicians and Surgeons of the City of New York; specialist in nervous and mental diseases since 1885.

OPINION.

That Thaw was insane when he shot White, *basing his opinion upon facts proven at the trial, by Thaw's counsel.* The form of the insanity was paranoia and was incurable.

DR. ALLEN ROSS DIEFENDORF.

Qualifications.

Graduate of the Academic Department of Yale University, then of the Medical Department of Yale University; was connected with the Worcester Hospital for the Insane at Worcester, Mass.; the Boston State Hospital and the Connecticut Hospital for the Insane at Middletown.

OPINION.

That Thaw was insane when he shot White,

basing his opinion upon the facts proven at the trial by Thaw's counsel. The form of insanity was paranoia and was incurable.

DR. WILLIAM MABON.

Qualifications.

Graduated at the Bellevue Hospital Medical College in 1881; remained in general practice for three or four years and then became assistant physician at the Morris Plains Asylum for the Insane in New Jersey, remained there a year and a half; then went to the Utica State Hospital for the Insane in 1887, and remained there until 1895; then became superintendent of the Willard State Hospital for the Insane in New York. After being in charge of this institution for one year, became superintendent of the St. Lawrence State Hospital for the Insane in New York and remained there seven years until appointed general medical superintendent of Bellevue and Allied Hospitals of New York City. Afterwards became President of the New York State Commission in Lunacy and then became superintendent and medical Director of Manhattan State Hospital on Wards Island, New York City, where large numbers of insane persons are confined. At the Utica State Hospital while Dr. Mabon was there, about 500 patients a year were received. The Willard State Hospital had an average of 300 insane admissions a year and the St. Lawrence State Hospital had an average of 1700 patients a year and an admission rate of about 300 a year while Dr. Mabon was there. At the Manhattan State Hospital he had under his charge about 4,300 insane patients and annual admissions run up as high as 2,000 a year. He was lecturer on mental diseases at the New York University and Bellevue Hospi-

tal Medical College. He has been a specialist in nervous and mental diseases for twenty-two years.

OPINION.

That Thaw was insane when he shot White, *basing his opinion upon the facts proven at the trial by Thaw's counsel* and by his observation of Thaw during the course of the trial for a number of weeks. The form of the insanity was paranoia and was incurable.

DR. CARLOS F. MACDONALD.

Qualifications.

A specialist in nervous and mental diseases since 1869; connected with very many institutions for the insane and had made an examination and diagnosis in a great many thousand cases of persons insane, perhaps the best known alienist in the United States.

OPINION.

Dr. MacDonald was not called as a witness at the first trial of Thaw but was present during all of the trial and observed Thaw, and upon the facts proven at the trial by Thaw's counsel, and his observation of Thaw, he rendered to the District Attorney an opinion that Thaw was insane at the time that he shot White, and that the form of his insanity was paranoia and was incurable.

II.

Upon the second trial of Thaw for homicide, the defense was insanity and counsel for Thaw called forty-nine (49) witnesses *who testified as to facts* showing Thaw insane.

This testimony the Commission did not examine although they were informed that it was available.

The prosecution called no expert witnesses. The facts proved by the witnesses called by Thaw's counsel included not only the facts given upon the first trial but many additional ones tending to prove Thaw insane.

Counsel for Thaw called as experts Drs. Evans, Jelliffe and Wagner, who had been called upon the first trial. They swore that in their opinion Thaw was insane when he shot White and did not define the form of his insanity. *Their opinion was based upon the facts proven by Thaw's counsel.*

In the cases of Drs. Evans and Wagner, they had made numerous and exhaustive personal examinations of Thaw.

The jury found a verdict of not guilty upon the ground, as stated in their verdict, that Thaw was insane when he shot White.

The Judge who presided at this trial adjudged Thaw's release to be dangerous and committed him to Matteawan Asylum for the Insane. This was not the Judge who presided at the first trial. This Judge did not hear the testimony of the experts for the People upon the first trial, who were of the opinion that the form of Thaw's insanity was paranoia and incurable. *None of the experts at the second trial expressed any opinion as to the form of Thaw's insanity and no evidence upon this point was given.* An English physician called to testify as to facts and not questioned as an expert volunteered the opinion that when he treated Thaw he was suffering from manic-depressive insanity.

III.

In 1908 there was a hearing occupying several days before a Justice of the Supreme Court upon a writ of habeas corpus to determine whether Thaw was sane or not.

He was adjudged insane and returned to Matteawan Asylum.

IV.

In 1909 there was a prolonged hearing for weeks before Mr. Jusice Mills, a Justice of the Supreme Court, upon a writ of habeas corpus to determine whether Thaw was sane or not.

He was adjudged insane and returned to Matteawan Asylum.

A large amount of testimony as to facts was given. Among the witnesses was Evelyn Thaw, the wife of the petitioner; Susan Merrill, at whose house many unspeakable sexual perversities on the part of Thaw took place; and Dr. Baker, who had been in charge of Thaw at Matteawan Asylum since his commitment. *These witnesses testified as to facts.*

This testimony the Commission did not examine although they were informed that it was available.

On this hearing Thaw was adjudged insane and returned to Matteawan Asylum.

Judge Mills wrote a long and carefully considered opinion finding Thaw suffering from paranoia. This opinion is reported in

118 N. Y. Supp., 388; s. c., 152 N. Y. St. Rep., 388

V.

In 1912 there was a prolonged hearing for weeks before Mr. Justice Keogh, a Justice of the Supreme Court, upon a writ of habeas corpus to determine whether Thaw was insane or not.

He was adjudged insane and returned to Matteawan Asylum.

Upon this hearing a large amount of *evidence as to facts* was adduced.

It appears from the report of the Commission that they did not consider this evidence, although they had it in their possession, except Thaw's examination and certain exhibits.

VI.

When Thaw was arrested for the killing of White, the Thaw family retained an expert, Dr. Britton D. Evans, a man who had had a large experience with the insane. He made eight prolonged physical and mental examinations of Thaw prior to the first homicide trial and he also was furnished by Thaw's counsel and his family with very much information in regard to Thaw. Prior to the first homicide trial he made a typewritten report of a confidential character to Thaw's attorneys. This report has since become public by reason of its having been filed in the United States Court in the Southern District of New York in a litigation therein conducted. It was never intended that this report should come into the hands of The People of the State of New York and an inspection of it was refused upon the trials. This report not only contains opinions and conclusions but many statements of facts observed by him in his examination of Thaw.

This report was not examined by the Commission, although it was available to them.

In that report is found the following:

"Concise Conclusions reached from a Study of Harry K. Thaw and his Family History.

"1. He has inherited an unsteady nervous system of a delicate poise.

"2. His nervous organization from birth has been one characterized by instability and marked susceptibility to excitement or irritation.

"3. He is, and has been during the greater part of his life, highly emotional.

"4. During the pubescent and adolescent periods of his life, his hereditary taint has exhibited itself from time to time, in emotional outbursts, loss of will-power and dethronement of reason, such as characterize a well known form of mental disease or mental derangement.

"5. His morbid manner of reasoning out ordinary propositions, his peculiar exhibitions of suspicion towards those about him, his periods of depression, alternating with exaltation and states of indifference to conditions and surroundings, establish the fact that not only had he inherited an unsteady central nervous system, a mental warp, and a morbid susceptibility to metal strain, but these exhibitions from time to time show that his mind has been—on numerous occasions—unbalanced to the point that his conduct and actions could only be recognized as the outcome of abnormal conditions and not the product of reason, sound judgment, and a properly adjusted emotional state.

"6. The form of mental disorder from which he has suffered on numerous occasions in the past, and from which he may again suffer should he be subjected to any unusual mental strain, is known to alienists as a 'Developmental' form of insanity, spoken of by the English and American writers generally as 'Adolescent Insanity;' by the German School as 'Dementia Praecox,' and by the Italians as 'Sensory Insanity.'

"7. Adolescent Insanity does not present the same features in any two given cases. This mental disorder nearly always shows an hereditary taint or the transmission of nervous irregularity and mental warp, through the mother's side of the family, the father's side of the family, or both. Hereditary transmission upon either side is serious, but when

it comes from both the paternal and maternal lines, the probabilities of calamitous results are greatly intensified.

"8. In some cases of Adolescent Insanity, the morbid manifestations from the first continue in evidence, and exhibit themselves in the form of a continuous dethronement of reason and self control. Other cases are characterized by periodical outbursts of emotional disturbances of maniacal or depressed character or both. Among the exciting causes of this disease are—hard study, shock, domestic troubles, financial losses, and those ordeals which carry along with them great mental strain and emotional excitement.

"9. Of this latter mentioned form Harry K. Thaw is a victim. From birth his mental or nervous heritage is one of peculiar warp, of unsteady or delicate balance. His emotions have been easily disturbed by such strains as a normal mind would have resisted. His reasoning processes have exhibited from time to time, marked irregularity. Under mental strain and excitement, he has frequently shown a loss of inhibitory power such as characterizes mental instability, and this has been to the point of unsoundness of mind.

"10. Emotional states, such as he has exhibited, carry with them a loss of reasoning power, a loss of will power and an inability to adjust himself to his environments or normally appreciate propositions and conditions about him. These diseased conditions or states mean that the subject acts from diseased impulses, that he is impelled by abnormal mental suggestions, is robbed of the power of exercising a normal will, and is, during the existence of such states or conditions, not a voluntary being. These overpowering morbid mental operations, out of adjustment with his relations to all about him, dominate him and make him a tool and controlled by the forces and processes of a diseased mind.'"

Summary.

(a) *The Commission did not consider the testimony of fifty-two (52) witnesses as to facts bearing upon Thaw's mental condition and the form of his insanity when he shot White.*

(b) *The Commission did not consider the opinion of fifteen (15) very prominent specialists in psychiatry who gave their opinions based upon the testimony as to facts of forty-nine (49) witnesses of whose testimony the Commission is ignorant.*

(c) *Fifteen prominent specialists were of the opinion that Thaw was insane on June 25, 1906. Seven of these did not define the form of insanity; eight of these said it was paranoia and incurable. A jury found Thaw insane on that date. Forthwith a Justice of the Supreme Court adjudged him insane. In the Spring of 1908 another Justice of the same Court adjudged him insane. In August, 1909, another Justice of the same Court adjudged him insane with incurable paranoia. In July, 1912, another Justice of the same Court adjudged him insane. Each of these Justices found that Thaw's release would be dangerous to the public peace and safety.*

(*Note.* The testimony of these alienists was not conflicting.) The following table shows this:

CALLED BY THAW:

1. Dr. Charles G. Wagner 2. Dr. Britton D. Evans 3. Dr. Graeme M. Hammond 4. Dr. Wm. A. White 5. Dr. Smith Ely Jelliffe 6. Dr. Charles W. Pilgrim 7. Dr. Menas S. Gregory	Of the opinion that Thaw was insane when he shot White. No opinion expressed as to the form of insanity.
8. Dr. Allan McLane Hamilton	Of the opinion Thaw was insane when he shot White. Form of insanity, incurable paranoia.

THE PEOPLE'S SPECIALISTS:

1. Dr. Austin Flint 2. Dr. Wm. Hirsch 3. Dr. Wm. B. Pritchard 4. Dr. Albert W. Ferris 5. Dr. Allan R. Diefendorf 6. Dr. Wm. Nabon 7. Dr. Carlos F. MacDonald	Of the opinion that Thaw was insane when he shot White. Form of insanity, incurable paranoia.

SECOND.

Some Conclusions.

(a) That Thaw was insane on June 25, 1906, and remained so until at least the latter part of July, 1912.

(b) That if Thaw had not continued insane until August 17, 1913, when he escaped, he would have been liberated in the manner prescribed by law as he had plenty of money and was entitled to a writ of habeas corpus.

(*Note.* This reasoning of course, implies the assumption that the Supreme Court of the State of New York would act fairly. This we ask this Court to assume.)

(c) That Thaw unlawfully killed a man on June 25, 1906.

(d) That there is a whole lot about the case that the Commission does not know.

THIRD.

The Report of the Commission.

A.

The Commission's Power and Authority.

Was to make "observations and examinations" and to have a hearing upon which evidence might be offered "in respect to acts, if any, since his (Thaw's) committal to Matteawan, tending to show personal violence, or any manifestation of a tendency, or disposition, to do physical harm?" (Rescript Sept. 17, 1913, p. 9.)

It would be a reflection upon the Court's capacity to adequately express itself to interpret the words of the Rescript as contemplating a hearing upon any question except the limited one specified. "Observations and examinations" "as to Thaw's present condition" cannot be construed into giving any one a right to appear before the Commission and put in evidence. These words naturally interpreted mean a physical and mental observation and examination of Thaw personally. To even go to the extent of examining *testimony as to facts* given upon trials and hearings to which he was a party and where the same question was involved would be to stretch the words used to the limit.

The scope of the Commission's power of inquiry was therefore so limited that the State of New York declined to take part in their proceedings. It did, however, offer to supply the Commission any information desired and called its attention to the fact that the testimony introduced on Thaw's behalf, at the two homicide trials above referred to, the evidence *as to facts* introduced upon the hearings in three writs of habeas corpus, and the

reports of Drs. Evans and Hamilton, Thaw's own alienist, were available.

1st. The State of New York considered an inquiry at which they had *rights* under the Rescript, "in respect to acts, if any, since his committal to Matteawan, tending to show personal violence, or any manifestation of a tendency, or disposition, to do physical harm" as of trivial importance. In paranoia or constitutional inferiority with paranoid tendencies, the sufferer is practically never violent except toward those within the sphere of his insane delusions. There was no one at Matteawan, or in association with him since his escape who was within the sphere of his insane delusions. The absence, therefore, of any acts of violence or tendency thereto was insignificant.

2nd. Any other inquiry the Commission might hold would be without the scope of the Rescript and upon such inquiry the State of New York would have no *rights*, but would be at the grace or mercy of the Commission. The State of New York could not consent to be a party in such an inquiry.

3rd. The State of New York was prepared, as a matter of courtesy, to furnish the Commission any information it could properly ask of it, and pointed out to the Commission the availability of the evidence above referred to.

B.

Paragraph III of the Report.

In Subdivision (a) of this paragraph the Commission say:

> "In rendering judgment on the verdict the Court declared that the form of insanity, and the only form which the jury could have found

on the testimony, was manic-depressive insanity."

The Commission failed to observe, *because they had not the testimony before them though they knew it was available*, that the prosecution called no experts and those called by the defense did not express any opinion as to the form of insanity, and the only opinion expressed as to the form of the insanity was one from an English doctor called by the defense *as a witness to facts*, who was not a specialist and who practically volunteered his testimony. Judge Dowling, who presided, did not preside at the first trial, and at the trial at which he presided the question as to the form of the insanity was not raised.

In Subdivision (b) of this paragraph reference is made to a lengthy examination of Thaw covering some 175 typewritten pages made in November, 1911, by Dr. John W. Russell, then Superintendent of the Matteawan Asylum. The Commission is apparently ignorant of the fact that this is the Dr. John W. Russell whose own testimony on the trial of the case of *The People against Anhut* for bribery, was in substance that he was in communication with Anhut about accepting a bribe of $25,000 to let Thaw out of Matteawan Asylum and did not appear to be indignant that Anhut should try and bribe him and make no complaint about it at the time, but accepted Anhut's hospitality in the big city. Anhut was convicted and sentenced to prison and it was clearly proven that Thaw had provided him with the means to bribe Dr. Russell, to wit, about the sum of $25,000.

C.

Paragraph IV of the Report.

1st. As to Subdivision 1 of this paragraph. While a physical examination is valuable to deter-

mine the presence or absence of certain forms of nervous or mental derangement, it is well established that in paranoia there are no physical symptoms from which a diagnosis can be made.

2nd. As to Subdivision 2 of this paragraph. Thaw's conduct in Matteawan Asylum and since would naturally and normally be exemplary if he was a paranoic. No one within the sphere of his insane delusions has been near him during that period.

3rd. As to Subdivision 4 of this paragraph. The Commission say that their inquisition has been directed, among other things, to:

> "4. The circumstances and conditions which outwardly and inwardly led to the homicide on June 25, 1906, and the probable condition of mind of Harry K. Thaw at that time."

It is difficult to see how this inquisition could have been anything but superficial when they failed to examine the testimony of forty-nine (49) witnesses as to facts called upon the first and second trials for homicide.

The Commission further say:

> "As a result of this careful search for the truth, and having had in view all that has been adduced for and against the allegation of constitutional inferiority, we have arrived at a definite and positive opinion as to the present mental condition of Harry K. Thaw and his probable state of mind at the time of the homicide."

How the search for the truth could have been "careful" when they neglected to examine the testimony of fifty-two (52) witnesses *to the facts tending to show insanity*, all of which was available to them, it is difficult for counsel to understand.

Perhaps the Commission is making a distinction between a "careful search for the truth" and a "very careful search for the truth."

In a matter of this importance, one would think that a "*very careful*" search for the truth should be made.

It is noteworthy that they do not declare what is the "definite and positive opinion" which they have arrived at.

The Commission Does Not Find Thaw Sane.

Is your Honor going to free a man on bail who is presumptively still insane? Whom the Commission does not find presently sane, and who has unlawfully taken human life while insane, because the Commission is of the opinion that "it is reasonably probable" he "would not be dangerous or a menace to the public peace and safety?"

As to "constitutional inferiority" of what value is the opinion of a Commission which, while it says:

> "and having had in view all that has been adduced for and against the allegation of constitutional inferiority"

yet appears not to have examined the testimony of the fifty-two (52) witnesses *as to facts* showing insanity available to it?

Summary.

So far as the report shows, or counsel can learn, all the Commission considered in forming its opinion was:

1. Its physical and mental examination of Thaw.

2. Exhibits introduced on hearings, all the products of Thaw.

3. The testimony of Holman Drew and Clark D. Stevens, Thaw's keepers since he has been in the custody of the U. S. District Court.

4. The case book of Matteawan Asylum.

What the Commission did not consider, but could and should have considered has been in a measure pointed out above.

With the exception of the exhibits last referred to, the whole contention of the State of New York that Thaw is insane and dangerous to be at large is based upon testimony as to facts available to the Commission and not considered by it at all.

FOURTH.

The testimony of Dr. Austin Flint, Dr. Carlos F. MacDonald, Dr. Amos T. Baker not considered by the Commission.

1.

Testimony of Dr. Austin Flint.

Dr. Flint observed and studied Thaw on more than eighty occasions and was present at a number of what constituted severe and prolonged mental examinations.

Eighty (80) observations of Thaw are very many times the number of observations made by the Commission or any of its members.

In addition Dr. Flint had before him all the testimony of fifty-two (52) witnesses *as to facts* bearing on Thaw's mental condition which was available to the Commission, *but not examined by them.*

Dr. Flint is of the opinion that Thaw is an incurable paranoiac and dangerous to be at liberty.

2.

Testimony of Dr. Carlos F. MacDonald.

Dr. MacDonald had practically the same opportunities, made the same number of observations and had before him the same testimony as stated above in regard to Dr. Flint.

He came to the same conclusion as Dr. Flint.

3.

Testimony of Dr. Amos T. Baker.

Dr. Amos T. Baker was Assistant Superintendent of Matteawan Asylum and had Thaw in charge for more than three years. He has had

greater opportunities to observe Thaw than any one living. For more than three years he observed and talked with him practically every day.

He is of the opinion that Thaw is an incurable paranoiac and dangerous to be at liberty.

Summary.

These three competent specialists in mental diseases have observed and studied Thaw longer and on more numerous and different character of occasions than any other living men.

Their opinions, given under oath, are set aside by the Commission after a few observations of Thaw and a total neglect to examine the testimony of the fifty-two (52) witnesses above referred to, all of which testimony was *as to facts* bearing on the question of insanity.

FIFTH.

Thaw should not be admitted to bail.

1.

Upon the trial of *The People* v. *Anhut* it appeared that Thaw gave Anhut property of the value of $25,000 to bribe Dr. Russell, the then Superintendent of Matteawan Asylum to release him. Does the Court think any lesser sum as bail would secure him?

2.

Thaw unlawfully killed White in 1906 as a result of being then insane.

3.

Fifteen well known specialists, eight employed by Thaw, and seven by the State of New York, were of the opinion that Thaw was insane on June 25, 1906.

4.

Eight well known specialists were of the opinion that on June 25, 1906, Thaw was insane, that the form of his insanity was paranoia and was incurable and that his release would be dangerous.

5.

Four Justices of the Supreme Court of the State of New York have since, after elaborate hearings, adjudged Thaw insane and that his release would be dangerous, the last adjudication being in August, 1912.

6.

The three competent specialists who have made

by far more numerous and prolonged observations and studies of the mental condition of Thaw during six years last past than any one else, and who are familiar with all the facts of the case, are of the opinion that Thaw is now incurably insane and that his release would be dangerous.

7.

The Commission has not found Thaw sane. It finds only

> "it is *reasonably probable* that Harry Kendall Thaw's liberty under bail would not be dangerous or a menace to the public peace and safety."

(a) This Court should not admit an insane man to bail and allow him to go unrestrained even though he would not be dangerous to others.

> (Note. Had the Commission examined the testimony at the homicide trials, they would have learned that Thaw tried to commit suicide on one occasion.)

(b) In 1906 Thaw was insane and so dangerous that he killed a man. The Commissoin does not find Thaw now sane.

After all these adjudications, is he not presumptively insane?

The people at large have a right that an insane man who has once taken human life should not be given freedom until

1. Either he is proven sane when admitted to bail; or

2. There is something stronger than "*a reasonable probability*" that he will not commit acts of violence. At the least it should be "*reasonably certain*" that he would not be dangerous if at liberty.

(Note. What is meant by the words "*reasonably probable*" in the Commission's report? A thing is "probable" to happen when there is more evidence that it will happen than there is evidence that it will not. *Vid.*, Standard Dict., "probable." A thing is "reasonably probable" when the probability is one that would commend itself to a reasonable person. At the most, then, the Commission say no more than that to a reasonable man Thaw is less likely than not to commit acts of violence if admitted to bail.)

SIXTH.

The State of New York enters its earnest protest against the admission to bail of a homicidal lunatic, simply because it is "reasonably probable" he will not again commit acts of violence.

Concord, New Hampshire, January 21, 1914.

THOMAS CARMODY,
Attorney General
of the State of New York.

WM. TRAVERS JEROME,
FRANKLIN KENNEDY,
BERNARD JACOBS,
Of Counsel.